

Sunshine Act Meetings

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Thursday, August 18, 1994

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL ELECTION COMMISSION

"FEDERAL REGISTER" NUMBER: 94-19794.

PREVIOUSLY ANNOUNCED DATE AND TIME:

Thursday, August 18, 1994, 10:00 a.m.

Meeting Open to the Public.

The following item was deleted from the agenda:

MCFL Rulemaking: Summary of Comments and Draft Final Rules.

The following item was added to the agenda:

Job Recommendations from Elected Officials and Political Party Officials.

PERSON TO CONTACT FOR INFORMATION:

Ron Harris, Press Officer, Telephone: (202) 219-4155.

Delores Hardy,

Administrative Assistant.

[FR Doc. 94-20454 Filed 8-16-94; 2:38 pm]

BILLING CODE 6715-01-M

AGENCY HOLDING THE MEETING: BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: Notice forwarded to the Federal Register on Friday, August 12, 1994.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 11:00 a.m., Monday, August 22, 1994.

CHANGES IN THE MEETING: Addition of the following closed item(s) to the meeting:

Proposals concerning Federal Reserve System Benefits.

CONTACT PERSON FOR MORE INFORMATION:

Mr. Joseph R. Coyne, Assistant to the Board: (202) 452-3204.

Dated: August 16, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94-20445 Filed 8-16-94; 1:57 pm]

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Federal Register

Thursday
August 18, 1994

Part II

Department of Education

**34 CFR Part 685
Federal Direct Student Loan Program;
Proposed Rule**

DEPARTMENT OF EDUCATION

34 CFR Part 685

Federal Direct Student Loan Program

RIN 1840-AC05

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary of Education proposes to amend the Federal Direct Student Loan (Direct Loan) Program regulatory policies and procedures which apply to loans under the Federal Direct Stafford Loan Program, the Federal Direct Unsubsidized Stafford Loan Program, the Federal Direct PLUS Program, and the Federal Direct Consolidation Loan Program, collectively referred to as the Direct Loan Program. These proposed regulatory policies and procedures would streamline the loan application and disbursement processes, provide ease in school administration of the loans, ensure program integrity, and protect the Federal fiscal interest.

DATES: Comments must be received on or before October 3, 1994.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Ms. Rachel Edelstein, U.S. Department of Education, 400 Maryland Avenue SW. (Room 4100, ROB-3), Washington, DC 20202-5257. (Internet address: direct_loans@ed.gov). All comments will be available for public review on the Department's Direct Loan bulletin board. The access number for the bulletin board for individuals with communications software and modems is 1-800-429-9933. In addition, Internet users may access the bulletin board by using the TCP/IP telnet command facility at the above Internet address.

A copy of any comments that concern information collection requirements should also be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble.

FOR FURTHER INFORMATION CONTACT: Ms. Rachel Edelstein, telephone: (202) 708-9406. (Internet address: direct_loans@ed.gov). Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:**Background**

The Student Loan Reform Act of 1993, enacted on August 10, 1993, established the Direct Loan Program under the Higher Education Act of 1965, as

amended (HEA). See Subtitle A of the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103-66). Under the Direct Loan Program, loan capital is provided directly to student and parent borrowers by the Federal Government rather than through private lenders.

The Direct Loan Program provides borrowers with a streamlined application process, flexible repayment options, and a simplified collection process. Direct Loan Program student borrowers apply for a loan at the same time that they apply for other title IV student financial assistance. No additional forms are required. Further, under the Direct Loan Program borrowers will be eligible for a variety of new repayment plans, including an extended repayment plan, a graduated repayment plan with an extended term, an income contingent repayment plan, and an alternative repayment plan. These repayment plans allow borrowers to tailor their loan repayment to their individual circumstances. The new repayment plans also give borrowers the opportunity to enter into lower-paying service careers while making reasonable payments on their educational debt. The income contingent repayment plan will reduce the incidence of default, because borrowers are required to repay only what they can reasonably afford. In addition, repayment procedures will be easier for borrowers under the Direct Loan Program than under the Federal Family Education Loan (FFEL) Program because the borrower will interact with only one servicer at a time throughout the life of the loan, rather than with multiple loan holders.

The HEA directed the Secretary to consult with members of the higher education community and to publish a notice of standards, criteria, and procedures for the program's first year (July 1, 1994 to June 30, 1995) in lieu of issuing regulations using the Department's usual procedures. In compliance with that requirement, the Secretary published three sets of rules for the first year. The first of these rules was published on September 10, 1993, and contained standards for school participation and loan origination criteria. The second was published on January 4, 1994, and included most of the policies and procedures relating to schools and borrowers in the Direct Loan Program. The third set of rules was published on July 1, 1994, and governed the repayment plans available to Direct Loan borrowers, including an income contingent repayment plan, and standards and procedures relating to Federal Direct Consolidation Loans.

The HEA also directed the Secretary, to the extent practicable, to develop

proposed rules for the Direct Loan Program through a negotiated rulemaking process for the second and subsequent years of the program (1995-1996 and beyond). With two exceptions, negotiated rulemaking was used to develop these proposed rules. The standards for school participation in the Direct Loan Program for the 1995-1996 academic year, which were published on February 17, 1994, and the criteria schools would need to meet to originate student loans in the Direct Loan Program in the 1995-1996 academic year, which were published on April 26, 1994, were discussed with members of the Direct Student Loan Regulations Negotiated Rulemaking Advisory Committee. In many cases, the results of those discussions were incorporated into those standards and criteria. The timely implementation of the Direct Loan Program for the 1995-1996 academic year did not permit the solicitation of further comment on those rules, and they were published in final form.

The negotiated rulemaking process for the development of this notice of proposed rulemaking began in January of 1994. The Direct Student Loan Regulations Negotiated Rulemaking Advisory Committee (the negotiators) met for several days each month from January through June and for one day in July. The goal of the negotiations was to reach consensus on a full notice of proposed rulemaking (NPRM) with consensus being defined as an absence of dissent from any of the negotiators. While consensus on an NPRM was not attained, substantive agreement was reached on most of the issues addressed by the regulations.

Provisions Proposed

These proposed regulations include policies and procedures necessary for borrowers and schools to participate in the Direct Loan Program for the 1995-1996 and subsequent academic years, including provisions relating to repayment of Direct Loans. Provisions relating to school participation and loan origination in this document are proposed for the 1996-1997 and subsequent academic years.

The policies and procedures in these proposed regulations have been selected to promote the statutory mandate that the Secretary make loans under the Direct Loan Program available to all eligible students attending participating institutions and their parents. For the 1996-1997 academic year, the Secretary estimates that 50 percent of all new loans made under the Department of Education's two major student loan programs will be made to students and

their parents participating in the Direct Loan Program. Thus, over three million recipients will benefit from this program during the 1996-1997 academic year, and millions more will benefit in future years. Due to the size and importance of this program, the proposed regulatory policies and procedures in this document have been chosen because they would streamline the loan application and disbursement processes, provide ease in school administration of the loans, ensure program integrity, and protect the Federal fiscal interest. Meeting Summaries of each meeting of the Direct Student Loan Regulations Negotiated Rulemaking Advisory Committee contain a fuller description of the considerations that were taken into account in the preparation of these proposed regulations. Copies of the Meeting Summaries will be available for public inspection with the comments submitted in response to the proposed rules.

In certain sections where Direct Loan provisions are different from (FFEL) Program provisions, the Secretary will propose comparable changes to FFEL Program regulations in a separate Notice of Proposed Rulemaking to be published shortly. Anticipated changes to the FFEL program are noted in the following discussion. The Secretary expects that the comment period end dates and effective dates for the final FFEL Program and Direct Loan Program regulations will coincide.

Summary of Contents

Subpart A—Purpose and Scope

§ 685.100 The Federal Direct Student Loan Program.

This section contains a general description of the program and lists the following components of the Federal Direct Student Loan Program:

- (1) The Federal Direct Stafford Loan Program;
- (2) The Federal Direct Unsubsidized Stafford Loan Program;
- (3) The Federal Direct PLUS Loan Program; and
- (4) The Federal Direct Consolidation Loan Program.

§ Section 685.101 Participation in the Direct Loan Program.

This section authorizes colleges, universities, graduate and professional schools, vocational, and proprietary schools selected by the Secretary to participate in the Direct Loan Program and allows the Secretary to permit a school to participate in both the FFEL Program and the Direct Loan Program simultaneously. A school may participate in both loan programs under

such terms as it determines would best serve the needs of its students, subject to the agreement of the Secretary. For example, a school could make the Direct Loan Program available to its first-time borrowers only and the FFEL Program available to its other students, or it could choose to participate in the Federal Direct Stafford Loan Program, the Federal Direct Unsubsidized Stafford Loan Program, and the Federal PLUS Program. In the latter example, a student could receive a Direct Loan while the student's parent could receive an FFEL loan.

§ Section 685.102 Definitions.

This section identifies the definitions in this notice of proposed rulemaking that are found in other Department regulations, i.e., in the Student Assistance General Provisions regulations (34 CFR Part 668), in the Institutional Eligibility regulations (34 CFR Part 600), and in the FFEL Program regulations (34 CFR Part 682), and also defines terms that are specific to these proposed rules. In several of these definitions the Secretary has incorporated revisions suggested by one or more of the negotiators.

Under the proposed definition of the term "estimated financial assistance", Federal Perkins Loan Program and Federal Work-Study Program aid that the student does not accept is not considered estimated financial assistance. Some negotiators criticized this proposal on the ground that it takes discretion away from the financial aid administrator. However, the financial aid administrator retains discretion in certifying the loan application. Under § 685.301(a)(5), an aid administrator may reduce the borrower's determination of need on a case-by-case basis, including a case in which a reduction in need is warranted even though the borrower has declined campus-based aid; the reason for the reduction must be documented in the student's file. The negotiators did not reach agreement on the definition for "estimated financial assistance".

The definition for "repayment period", contained in the regulations for the first year of the program, has been deleted from these proposed regulations because information that was provided in that definition (on which the negotiators disagreed) is included in other provisions.

The definition of the term "estimated cost of attendance" in the first-year regulations has also been deleted from these proposed regulations and will likewise be proposed to be deleted from FFEL Program regulations. A definition of this term will be proposed in

forthcoming General Provisions regulations.

§ 685.103—Applicability of Subparts

This section states in general terms the content of each subpart of this notice of proposed rulemaking. Subpart A addresses the purpose and scope of the document. Subpart B addresses borrower provisions. Subpart C addresses school requirements. Subpart D contains standards for the participation of schools in the program and the criteria for determining a school's role in the loan origination process.

Subpart B—Borrower Provisions

§ 685.200 Borrower Eligibility.

This section lists the eligibility requirements for a student borrower in paragraph (a) and for a parent borrower in paragraph (b). Currently, a borrower whose previous loan was cancelled due to total and permanent disability is not eligible for a new loan unless he or she reaffirms the prior debt and receives a certification from a physician that the borrower's condition has improved. Based on comments from a number of the negotiators, these proposed regulations would eliminate those requirements. The borrower would need to obtain a certification from a physician that the borrower is able to engage in substantial gainful activity (but not that the borrower's condition has improved). The Secretary intends to propose identical changes for the FFEL Program. The Secretary invites comments on how to define "substantial gainful activity" for this purpose. The negotiators did not reach agreement on the requirement in § 685.200(a)(1)(iv)(A) that a student reaffirm previous loans that were discharged in bankruptcy to qualify for a Direct Loan or on the requirement in § 685.200(b)(7)(i)(C) that a parent document extenuating circumstances if he or she has an adverse credit history and wants to receive a Direct PLUS Loan.

This section also requires, in paragraph (c), that a borrower who is currently in default on a FFEL loan or a Direct Loan must make satisfactory repayment arrangements on the defaulted loan to be eligible to borrow under the Direct Loan Program. This requirement does not apply to defaulted borrowers who consolidate their loans and agree to repay under the income contingent repayment plan. Finally, paragraph (d) lists the loans that may be used to replace a student's expected family contribution.

§ 685.201. Obtaining a Loan.

Paragraph (a) of this section describes the requirement for a student who

wishes to obtain a Direct Student Loan to complete a Free Application for Federal Student Aid and the school's responsibility to perform certain functions to process that loan application. A school's responsibilities are differentiated depending on the procedures it follows to originate loans, or whether it uses the services of an alternative originator. Paragraph (b) describes the process a parent borrower uses to apply for a Direct PLUS Loan and also describes the school's responsibilities according to the procedures it follows to originate or assist in the origination of PLUS Loans. Paragraph (c) describes the process for obtaining a Direct Consolidation Loan. The negotiators did not reach agreement on the application procedures for a Direct Consolidation Loan in § 685.201(c).

§ 685.202 Charges for Which Direct Loan Program Borrowers are Responsible.

This section specifies the charges that a borrower may incur in the Direct Loan Program. The loan interest rates applicable to various types of loans are listed in paragraph (a), and the rules on when unpaid interest is capitalized are detailed in paragraph (b). Based on comments from many of the negotiators, the Secretary has specified when the capitalization of interest will occur. Interest on a Direct Unsubsidized Loan will not be capitalized until the borrower enters repayment. If a borrower is in a deferment period on a Direct Unsubsidized Loan, or in a forbearance period on any loan, the Secretary will capitalize interest that has accrued at the expiration of the deferment or forbearance. If a borrower has agreed to make payments of interest when payments of principal are not due and becomes past due on those interest payments, the Secretary will capitalize the unpaid interest, after notification to the borrower, in order to keep that borrower from defaulting on those interest payments. Finally, with certain exceptions referred to in § 685.202(b)(5), if a borrower is making payments on a loan that do not cover all of the accruing interest, the Secretary will capitalize the remaining interest on an annual basis.

Loan fees, late charges, and collection charges (both before and after default) are addressed in paragraphs (c), (d), and (e) of this section, respectively. The section specifies the Secretary's authority to assess certain charges but does not require the Secretary to do so. The maximum fees and charges that could be charged in the Direct Loan Program are the same as those authorized for the FFEL Program. The negotiators did not reach agreement on

late charges and collection charges in § 685.202 (d) and (e).

§ 685.203 Loan Limits.

This section contains the statutory loan limits, both annual and aggregate amounts (and prorated amounts for programs that are less than an academic year), for various classes of students and for the various Direct Loans. The amount available for a Direct Subsidized Loan to an undergraduate student in the first year of his or her program is determined by the length of the program in comparison to the academic year. An undergraduate student in subsequent years of his or her program is eligible for increasingly higher loan amounts, but those amounts are prorated for that portion of the program less than an academic year in length that remains after the student completes one or more academic years of study. For example, an undergraduate student in the second year of his or her program has a loan limit of \$3,500 for an academic year of study. However, if that student has less than a full academic year of study remaining in the program, that loan limit would be prorated based on the number of hours for which the student enrolls (see §§ 685.203(a)(2), (3) and 685.301(a)(4)(ii)). If this borrower needed nine semester hours but was enrolled for 12 semester hours (which is one-half of an academic year) the borrower would qualify for a \$1,750 loan.

Students may also be eligible to borrow Direct Unsubsidized Loans. The loan limits are the same as for Direct Subsidized Loans, minus the amount of any Direct Subsidized Loan amount borrowed. For example, if the limit is \$3,500 and the borrower received a \$2,000 Direct Subsidized Loan, that borrower may receive a \$1,500 Direct Unsubsidized Loan. Independent, graduate and professional students, and certain dependent students may borrow additional amounts of Direct Unsubsidized Loans.

Paragraphs (d) and (e) describe the aggregate loan limits for Direct Subsidized and Direct Unsubsidized Loans. The aggregate amount a dependent undergraduate could receive under these programs is \$23,000; an independent undergraduate could receive \$46,000. A graduate student could receive \$138,500, including any loans for undergraduate study. Paragraphs (f) and (g) discuss loan limits for PLUS Loan borrowers. For both annual and aggregate PLUS limits, the total amount of the loan may not exceed the cost of attendance minus other estimated financial assistance for that student.

§ 685.204 Deferment.

This section lists the conditions under which a Direct Loan Program borrower is eligible for deferment of payments. For Direct Unsubsidized, Direct Subsidized, and Direct PLUS Loans, the conditions for deferment are limited to the conditions listed in the statute for Direct Loans. However, the statute provides the Secretary with latitude in setting the terms, conditions, and benefits (including deferment provisions) for Federal Direct Consolidation Loans. In order to establish comparable deferment provisions under both the Direct Loan and FFEL Programs, the proposed regulations provide that Direct Loan borrowers with outstanding FFEL loans as of June 30, 1993, who consolidate their FFEL loans or their Direct Loans, or both, into a Direct Consolidation Loan are eligible for deferments under the provisions that were in effect prior to the recent reauthorization of the Higher Education Act. Thus, these borrowers maintain the same deferment benefits for which they would have been eligible under the FFEL Program and are eligible for the deferments that are available to other Direct Loan borrowers if they consolidate into the Direct Loan Program.

A Direct Loan borrower is eligible for an economic hardship deferment under the same standards that apply under the FFEL Program. This deferment is available for periods of up to one year at a time that, collectively, do not exceed three years if the borrower (1) Has been granted an economic hardship deferment under either the FFEL or the Federal Perkins Loan Programs; (2) is receiving payment under a Federal or State public assistance program; (3) is working full-time and earning a total monthly gross income that does not exceed the greater of the minimum wage or the poverty level for a family of two; or (4) is not receiving total monthly gross income that exceeds twice the minimum wage or the poverty level for a family of two, and, after deducting monthly payments on Federal postsecondary loans, the remaining amount does not exceed the minimum wage or the poverty level for a family of two. See § 682.210(s)(6) of the FFEL Program regulations.

§ 685.205 Forbearance.

This section defines forbearance (the temporary cessation of payments, an extension of time for making payments, or making smaller payments than originally scheduled) and lists the reasons for which the Secretary grants forbearance. Paragraph (a) lists five reasons for which the borrower may

request forbearance: (1) The borrower's inability to make payments; (2) payment of principal is being deferred and payment of interest is not subsidized; (3) certain medical and dental internships and residencies; (4) national service under the National and Community Service Trust Act of 1993; and (5) title IV loan payment amounts are equal to or greater than 20 percent of total monthly gross income. The borrower must provide documentation to support the request for forbearance.

The Secretary grants administrative forbearance in a number of circumstances, examples of which are listed in paragraph (b). Documentation from the borrower is not required for administrative forbearance.

§ 685.206 Borrower responsibilities and defenses.

Paragraph (a) of this section lists the information a borrower must provide in order to start the origination process for a Direct Loan. Paragraph (b) requires the borrower to notify the Secretary of changes in certain personal information, such as name and address. Paragraph (c) describes certain defenses a borrower may raise against repayment. A Direct Loan borrower may request that the Secretary exercise his long-standing authority to relieve the borrower of his or her obligation to repay a loan on the basis of an act or omission of the borrower's school. This paragraph lists several types of proceedings (including but not limited to a tax refund offset proceeding, a wage garnishment proceeding, a salary offset proceeding (for Federal employees), and a credit bureau reporting proceeding) in which a borrower may assert a defense. Paragraph (c) also states the relief that the Secretary grants to the borrower (beyond relief from the obligation to repay the loan) if the defense against repayment is successful. The paragraph further states that the Secretary may initiate an appropriate proceeding to require the school to pay the amount of the loan to which a successful defense applies. Under the proposed rules, the Secretary does not initiate such a proceeding after the period during which the school is required to retain records unless the school receives actual notice of the borrower's claim during that period.

This proposed rule relating to borrower defenses to repayment of a loan is intended to be effective for the 1995-1996 academic year only. After the publication of this proposed rule, the Secretary will work with interested parties to develop regulations for borrower defenses that would apply to both the Direct Loan Program and the

FFEL Program. When published in final form, the new regulations would apply to the 1996-1997 and subsequent academic years.

Sections 685.207-685.211

During negotiations concerning repayment provisions, the Department and the community each made major compromises and reached agreement on many repayment issues in, but not all of the terms of, §§ 685.207 through 685.211. The Department incorporated many of the suggestions made by the negotiators relating to the repayment provisions, including extending the number of years of repayment under the graduated repayment plan and making extensive changes to the income contingent repayment plan (ICRP).

The Secretary believes that these repayment plans, as proposed, provide a broad array of options that allow borrowers to repay their loans in the ways that best suit their needs. Moreover, borrowers can change repayment plans as their financial circumstances change. The Secretary has determined that the proposed repayment plans are cost-neutral for the Federal government; that is, the repayment plans as a whole would not exceed the cost of the standard repayment plan. Under the ICRP, the Secretary proposes that interest no longer be capitalized once the principal loan balance reaches one and one-half times the amount owed by the borrower when the borrower enters repayment. This proposal would allow borrowers who cannot make loan payments in some years because of low incomes, but can repay in other years when their incomes are higher, to do so while limiting the increase in the amount owed due to capitalization. The Secretary seeks comments from the public relating to the repayment provisions, especially the ICRP. The Secretary believes that the proposed rules in the ICRP would provide students at various income levels the opportunity to obtain further education and choose career paths without being limited by the amount of their student loan debt. The plan would also ensure that borrowers repay their loans if they are able to do so.

The Secretary particularly seeks comments on whether the proposed percentage of income required to be paid under the ICRP is too high and on whether the proposed length of the repayment periods should be longer. The Secretary also seeks comments on the limits on capitalization and the repayment amounts for low-income borrowers. The Secretary intends to review the ICRP formula for borrowers

whose first Direct Loan is entering repayment each year and make any necessary changes based on the experience of the program.

§ Section 685.207 Obligation to repay.

This section contains provisions relating to a borrower's obligation to repay a Direct Loan that generally parallel provisions applicable to the FFEL program. On the basis of consultations with members of the higher education community, the Secretary has included clarifying provisions concerning (1) the collection costs for which a borrower is responsible (in paragraph (a)) and (2) the borrower's obligations upon re-enrolling in school after a loan has entered repayment (in paragraph (b)(1)).

§ Section 685.208 Repayment Plans.

This section describes the various repayment plans available to Direct Loan borrowers under section 455(d)(1) of the HEA. These repayment plans offer borrowers flexible alternatives and allow borrowers to determine the type of repayment that best suits their individual financial situations. Although the negotiators did not reach agreement on this section, it reflects many suggestions made by negotiators. The Secretary requests comments on the proposed provisions of the repayment plans.

To simplify the administration of the program, paragraph (a)(4) requires that all Direct Loans obtained by a borrower be repaid together under the same repayment plan. The sole exception to this requirement is that Direct PLUS Loans (which are the only loans that may not be repaid under the income contingent repayment plan) may be repaid separately.

The features of the standard repayment plan, described in paragraph (b), are comparable to the standard repayment plan under the FFEL Program. Generally, a borrower must repay the loan by making fixed monthly payments for ten years. Under the extended repayment plan described in paragraph (c), a borrower must repay the loan by making fixed monthly payments within an extended period of time of 12 to 30 years that varies with the borrower's debt level. The repayment period under this plan is the same as the period for repayment of a consolidation loan under the FFEL Program.

Under the graduated repayment plan described in paragraph (d), a borrower must repay the loan by making monthly payments at two or more levels within the same period of time as under the extended repayment plan. The Secretary believes that making the repayment

period under the graduated repayment plan equal to the repayment period under the extended payment plan offers flexibility and enables a borrower to assess the relative benefits of the various repayment plans. This section provides that the Secretary may adjust the number of payments or the monthly payment amount under the standard, extended, and graduated repayment plans to reflect changes in the variable interest rate identified in § 685.202(a).

The income contingent repayment plan is summarized in paragraph (f) and described in detail in § 685.209 and Appendix A. Under this plan, a borrower may choose to repay Direct Loans in one of two ways described in § 685.209. A borrower's monthly repayment amount generally varies with the Adjusted Gross Income (AGI) reported by the borrower, the amount of the borrower's Direct Loan debt, and family size. However, a borrower would have the option of never making a monthly repayment under ICRP that is greater than the amount the borrower would repay over 12 years using standard amortization. Specific provisions in § 685.209 apply in the case of a married couple who wish to repay their Direct Loans jointly. Payments under the income contingent repayment plan increase progressively with debt to discourage excessive borrowing and to ensure that most borrowers repay their loans within the 25-year period allowed by the statute. The borrower is not required to repay any amount that remains outstanding at the end of the repayment period. Under current tax law, any amount not repaid is considered taxable income.

The Secretary intends to review periodically the method for calculating monthly repayment amounts under the income contingent repayment plan. However, if the Secretary amends the regulations governing that method, the regulations in effect when a borrower's first Direct Loan enters repayment determine the monthly repayment amount for all the borrower's Direct Loans unless the borrower requests otherwise.

The alternative repayment plan provisions in paragraph (g) implement the Secretary's statutory authority to provide an alternative plan, on a case-by-case basis, to a borrower who can demonstrate that none of the other available plans can accommodate the borrower's exceptional circumstances.

Under these proposed regulations, PLUS borrowers are eligible for repayment periods of up to 30 years under the extended and graduated repayment plans, depending on their debt levels. The Secretary requests

comments concerning whether the 30-year repayment period is appropriate for PLUS borrowers or whether the maximum repayment periods for these borrowers should be shorter.

§ 685.209 Income contingent repayment plan.

This section contains provisions governing the two options available for repayment of Direct Loans under the income contingent repayment plan (ICRP). The ICRP is designed to be attractive to a broad range of borrowers. Although the negotiators did not reach agreement on this section, it reflects many of their suggestions. The plan provides reasonable monthly repayment amounts for borrowers with varying amounts of debt and income and ensures that most borrowers repay their loans in a reasonable amount of time. The plan also addresses excessive borrowing through a payback rate that rises as debt increases. Examples of the calculation of monthly repayment amounts under both options, together with a table showing the repayment amounts for borrowers at various income and debt levels, are included in Appendix A to the regulations. Borrowers may change between the two ICRP options one time each year. There are no limits on the number of times a borrower who is not in default may switch among repayment plans.

Option 1. Calculation of the monthly payment under Option 1 of the ICRP is described in paragraph (b). In general, the borrower's annual repayment obligation is the borrower's AGI multiplied by a "payback rate" that is based on the borrower's debt. The monthly payment is the annual repayment obligation divided by 12, minus an adjustment for family size. The "payback rate" varies from four to 15 percent, calculated as described in paragraph (b)(2). The family size adjustment is seven dollars per dependent for up to five dependents. If the calculated monthly payment is less than \$25, the borrower is not required to make a payment. When a borrower is not required to make a payment or the payment does not fully cover interest, any unpaid interest on the principal accrues and is capitalized until the limitation on capitalization of interest is reached.

Option 2. Calculation of the monthly payment under Option 2 of the ICRP is described in paragraph (c). In general, under this option, a borrower's monthly payment is the same as under Option 1 except that no payment exceeds the monthly amount the borrower would repay over 12 years using standard amortization. If a borrower chooses this

option: (1) The borrower's payments do not exceed the 12-year standard amortization amount regardless of the borrower's income; (2) the borrower's repayment period may be extended beyond the repayment period under Option 1 (but not beyond the 25-year maximum repayment period described in § 685.209(d)(2)(i); and (3) interest accrues throughout the repayment period and is capitalized until the limitation on capitalization of interest is reached.

Joint repayment by married borrowers. This section includes provisions for joint repayment of Direct Loans by married borrowers. A step-by-step calculation of a combined amount is included as Example 2 in Appendix A.

Repayment period. Provisions governing the repayment period under the ICRP are contained in paragraph (d)(2). The maximum period is 25 years, excluding periods of authorized deferment and forbearance under §§ 685.204 and 685.205, respectively, and periods in which the borrower made payments under another repayment plan. The Secretary believes the exclusion of repayment periods under other plans is needed to prevent abuses through which a borrower might be able to avoid repaying a portion of the loan by shifting from one plan to another as the borrower's income changed.

If a borrower repays more than one loan under the ICRP and the loans enter repayment at different times, a separate repayment period for each loan begins when the loan enters repayment. This approach ensures that no loan will be repaid under the ICRP for more than 25 years. If multiple loans enter repayment at the same time, a single repayment period applies.

To encourage borrowers to begin repaying their loans and to limit negative amortization at the beginning of the repayment period, a borrower must make monthly payments of accrued interest until the Secretary calculates the borrower's monthly payment on the basis of the borrower's income. A borrower who is unable to make monthly payments of accrued interest or qualify for a deferment under § 685.204 may request forbearance under § 685.205 or may request an alternative repayment plan under § 685.208(g).

Limit on capitalization of interest. The Secretary believes that the proposed limit on the amount of interest that is added to principal (the capitalization of interest) reflects an appropriate balance between ensuring that a borrower repays, if he or she can, and extending

the opportunity for students to invest in themselves. This limit on capitalization is desirable to prevent an excessive increase in a borrower's debt when the borrower's income is insufficient to cover accruing interest, while maintaining the program's cost-neutrality for the Federal government. Paragraph (d)(3) permits capitalization of unpaid interest until the outstanding principal amount increases to one and one-half times the amount owed by the borrower when the borrower enters repayment. Thereafter, unpaid interest accrues but is not capitalized. For example, if a Direct Unsubsidized Loan borrower owes \$10,000 upon entering repayment (after interest that accrued during the in-school period is capitalized), interest will no longer be capitalized if the borrower's principal balance increases to \$15,000.

Consent to disclosure of tax return information. In order to repay a Direct Loan under the ICRP, a borrower must consent, on a form provided by the Secretary, to the disclosure of certain tax return information by the Internal Revenue Service to agents of the Secretary for purposes of calculating a monthly repayment amount and servicing and collecting a loan. The information subject to disclosure is taxpayer identity information as defined in 26 U.S.C. 6103(b)(6) (including such information as name, address, and social security number), tax filing status, and AGI. Paragraph (d)(5) describes the procedures for providing written consent and requires that consent be provided for a period of five years. If a borrower selects the ICRP but fails to provide or renew consent, or withdraws consent without selecting a different repayment plan, the Secretary designates the ten-year standard repayment plan for the borrower.

§ 685.210 Choice of Repayment Plan.

This section governs a borrower's initial selection of a repayment plan and the borrower's ability to change plans thereafter. Before a Direct Loan enters repayment, the Secretary sends the borrower a description of the available repayment plans and requests the borrower to select one. If the borrower does not select a plan within 45 days, the Secretary designates the standard repayment plan for the borrower.

To accommodate the many changes in life circumstances that a borrower may experience over the life of a loan, the Secretary has placed no limit on the number of times a borrower may change plans, other than limits on a borrower who is repaying a defaulted loan under the ICRP. Such a borrower must demonstrate a consistent pattern of

repayment and obtain the Secretary's approval before changing repayment plans. Under § 685.209(a)(2), a borrower may change options under the ICRP no more frequently than once a year.

A borrower may change to the ICRP at any time, but may not change to any other plan if that plan has a maximum repayment period of less than the period the loan has already been in repayment. For example, a borrower who makes payments for 12 years under the extended repayment plan may not change to the standard repayment plan, which has a ten-year repayment period. The repayment period under the new plan is calculated from the date the loan initially entered repayment, except in the case of the ICRP (see § 685.209(d)(2)). Thus, a borrower who repays a loan under the extended repayment plan for three years and then changes to the standard repayment plan has seven more years to repay the loan. The negotiators did not reach agreement on this section.

§ 685.211 Miscellaneous Repayment Provisions.

This section governs an assortment of topics relating to the repayment of Direct Loans. Paragraph (a) permits a borrower to prepay all or part of a loan at any time and states how a prepayment is applied. Negotiators disagreed, in particular, on the order in which the Secretary applies payments to accrued charges and collection costs, outstanding interest, and outstanding principal on loans in § 685.211(a)(1). Paragraph (b) states how the Secretary applies a refund due to a borrower from a school and provides that the Secretary notifies the borrower of the refund. Paragraph (c) describes the effects of a borrower's default on a Direct Loan. Paragraph (d) sets out the standards by which the Secretary determines that a borrower is ineligible for some or all of a Direct Loan and describes how the Secretary seeks repayment of the loan. Paragraph (e) contains the conditions under which a defaulted Direct Loan is rehabilitated and states that the Secretary then instructs any credit bureau to which the default was reported to remove the default from the borrower's credit history.

§ 685.212 Discharge of a Loan Obligation.

This section provides for the Secretary's discharge of the obligation of a borrower and any endorser to repay a loan if (1) the borrower (or the student on whose behalf a parent borrowed) has died; (2) the borrower has become totally and permanently disabled, as described in paragraph (b); (3) the borrower's obligation to repay is

discharged in bankruptcy; (4) the borrower meets the criteria in § 685.213, relating to closed schools; or (5) the borrower meets the criteria in § 685.214, relating to false certification or unauthorized disbursement.

§ 685.213 Closed School Discharge.

This section provides for the discharge of the obligation of a borrower and any endorser to repay a loan if the borrower (or student on whose behalf the parent borrowed) did not complete the program of study for which the loan was made because the school closed. The provisions of this section are modeled on provisions for the FFEL Program published on April 29, 1994 (59 FR 22462), in order to provide borrowers with comparable protection under both programs. The qualifications for discharge under this section are set out in paragraphs (c) through (e). Among other requirements, a borrower must cooperate with the Secretary in any judicial or administrative proceeding to recover amounts discharged or to take related enforcement action. The Secretary will request only the reasonable cooperation of the borrower. Negotiators disagreed, in particular, on the requirement for a student to have withdrawn from a school within 90 days (or longer in exceptional circumstances) of the school's closure in order for the student to qualify for a closed-school discharge of his or her loan in § 685.213(c)(1)(ii). The discharge procedures used by the Secretary are described in paragraph (f).

§ 685.214 Discharge for False Certification of Student Eligibility or Unauthorized Payment.

This section provides for the discharge of the obligation of a borrower and any endorser to repay a loan if (1) a school falsely certifies the loan eligibility of the borrower (or the student on whose behalf a parent borrowed), or (2) the school endorsed the borrower's loan check or signed the borrower's authorization for electronic funds transfer without authorization. The provisions of this section are modeled on the April 29, 1994 FFEL Program provisions. During negotiations, some negotiators expressed concern that § 685.214(a)(1) could be read to encourage loans to students who could not meet the basic requirements for employment in the occupation for which they were being trained. To address this concern, a new paragraph (a)(1)(iii) has been added. The Secretary emphasizes (1) that this paragraph is not intended to affect the application of any Federal or State statute that prohibits discrimination,

including the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*), and (2) that this section pertains to the discharge of a borrower's obligation to repay a Direct Loan and does not address school liability.

The qualifications for discharge under this section are set out in paragraph (c) and include the requirements in § 685.213 relating to cooperation with the Secretary in enforcement actions and transfers to the Secretary of any rights to a loan refund.

The Secretary will request only the reasonable cooperation of the borrower. The discharge procedures used by the Secretary are described in paragraph (d). The negotiators disagreed on the eligibility of a student for loan discharge due to false certification or unauthorized payment by the school under § 685.214.

§ 685.215 Consolidation.

This section contains provisions governing the consolidation of certain Federal education loans into Federal Direct Consolidation Loans.

Eligible loans. The types of loans that may be consolidated under this section are listed in paragraph (b) and include all loans made under the Federal Family Education Loan (FFEL) Program, the Direct Loan Program, and the Federal Perkins Loans Program, as well as certain loans made under the Public Health Service Act. The Secretary has included consolidation loans made under the FFEL Program to permit virtually all FFEL borrowers to participate in the income contingent repayment plan that is available only under the Direct Loan Program.

Types of Federal Direct Consolidation Loans. There are three types of Federal Direct Consolidation Loans—subsidized, PLUS, and unsubsidized consolidation loans. The loans that may be consolidated into each type of consolidation loan are listed in paragraph (c). Subsidized consolidation loans allow borrowers to continue to be free of the obligation to pay interest during authorized periods of deferment. PLUS consolidation loans are available for loans made to parents on behalf of students. Unsubsidized consolidation loans are available for all other eligible types of loans.

Borrower eligibility. The eligibility requirements that a borrower must meet to obtain a Federal Direct Consolidation Loan are stated in paragraph (d). In the second year of the program, a borrower attending a Direct Loan school will be able to consolidate both FFEL and Direct Loan Program loans during the in-school period. If a borrower does so, the borrower receives a six-month grace

period on the Direct Consolidation Loan. Direct Loan borrowers and FFEL loan borrowers may consolidate their loans under the Direct Loan Program if they meet the requirements of paragraph (d). With the exception of provisions taken from statute concerning FFEL loans that may be consolidated into a Direct Loan, most of the requirements parallel requirements for the FFEL Program.

The Secretary has included provisions that prevent consolidation by (1) a borrower who is in default, unless the borrower has made satisfactory arrangements to repay the defaulted loan or agrees to repay the consolidation loan under the ICRP; and (2) a PLUS loan borrower with an adverse credit history at the time of consolidation, unless the borrower obtains an endorser or provides evidence of extenuating circumstances. Married borrowers may consolidate their loans jointly if they agree to be held jointly and severally liable on the consolidation loan and meet the other requirements of paragraph (d)(2).

Loan application and origination. A single application for one or more consolidation loans is permitted under paragraph (e). That paragraph also permits a borrower to add eligible loans upon request within 180 days after the date of the consolidation loan's origination. Provisions in paragraph (f) govern origination of consolidation loans. Paragraph (f)(1) provides that, in making a consolidation loan, the Secretary pays the holder of a consolidated loan the amount necessary to discharge the loan. The amount paid to the holder of a loan not in default is the amount of the unpaid principal, accrued interest, and allowable charges. In the case of a loan that is in default, and on which the holder may have submitted a claim for reinsurance, the Secretary is considering how to determine the appropriate amount to be paid to discharge the loan and invites comments on the question.

In addition, regarding defaulted loans that are consolidated into a Direct Consolidation Loan, paragraph (f)(1) limits collection costs for which the borrower is responsible to no more than those authorized under the FFEL Program (currently 18½ percent of the consolidated loan). This paragraph also provides that the Secretary may establish new lower reasonable limits on the amount of collection costs paid to the holder of the defaulted loan, such as the actual cost incurred by the note holder. The Secretary specifically invites comments on how reasonable limits on these costs should be established.

Interest rates. The Secretary has decided to apply to Federal Direct Consolidation Loans the same variable interest rates that apply to other Direct Loans. The Secretary believes these rates will be beneficial to most borrowers.

Repayment and refunds. As provided in paragraph (h), a borrower may repay a Federal Direct Consolidation Loan under any of the Direct Loan repayment plans, except that certain restrictions apply to defaulted borrowers, and the ICRP is not available to a PLUS consolidation loan borrower. The Secretary has included the exception for PLUS borrowers to provide consistency with the statutory prohibition against repayment of Direct Loans by parents under the ICRP. The provisions of paragraphs (i) and (j), relating to repayment periods and repayment schedules, respectively, are taken from the FFEL Program, as are provisions in paragraph (k), relating to a lender's obligations upon receiving a refund from a school on a loan that has been consolidated.

Joint consolidation loans. If two married borrowers obtain a joint consolidation loan, special provisions apply under paragraph (l). This paragraph provides that both borrowers must meet the requirements of the applicable section in order to obtain a deferment under § 685.204 or forbearance under § 685.205. To obtain a discharge under § 685.212, each spouse must qualify for one of the types of discharge described in that section. The Secretary discharges a portion of the loan if one spouse meets the requirements of § 685.212 (d) or (e).

Subpart C—Requirements, Standards, and Payments for Direct Loan Program Schools

§ 685.300 Agreements between an eligible school and the secretary for participation in the direct loan program.

Paragraph (a) of this section states the requirements for a school to participate in the Direct Loan Program. First, the school must meet the requirements for eligibility under the HEA and applicable regulations. Second, the school must enter into a written program participation agreement with the Secretary. Under the agreement, the school agrees to comply with the HEA and applicable regulations, and paragraph (b) lists several specific provisions of the program participation agreement. Paragraph (c) states the requirement that a school or a consortium of schools enter into a supplemental agreement if the school or consortium originates loans in the Direct Loan Program.

§ 685.301 Certification of a loan by a Direct Loan Program school.

This section states the requirement that a school participating in the Direct Loan Program provide accurate information to the Secretary in connection with the origination of a loan and details other provisions relating to the determination of borrower eligibility and loan amount. Paragraph (b) addresses the procedures the school must follow in disbursing the loan. Paragraph (c) requires that a school that originates a loan provide a promissory note to the Secretary.

§ 685.302 Schedule requirements for courses of study by correspondence.

This section contains requirements relating to the enrollment status of students in schools that offer programs of study by correspondence, including the requirement that the school establish a schedule for the submission of lessons and provide it to prospective students.

§ 685.303 Processing loan proceeds and counseling borrowers.

This section establishes requirements for a school's processing a borrower's Direct Loan and counseling borrowers. The purpose of this section is stated in paragraph (a). Standards regarding the timing, amount, and procedures for the disbursement of funds to a borrower are set out in paragraphs (b) through (d). These standards vary according to the type of school, year of the borrower's program of study, and the school's mode of origination. Paragraph (b)(3) states the obligations of a school when a student does not attend school during the loan period.

A number of the restrictions that are proposed in this section, such as the limitation that a school may not credit a student's account more than 21 days prior to the first day of the period of enrollment, or that the school may not pay the student directly more than 10 days prior to the first day of the period of enrollment, are limitations that currently exist in the administration of the other title IV programs. The negotiators did not reach agreement on the requirements in § 685.303(c)(1)(i) and (iii) that a school credit a student's account and make available the remaining proceeds to the borrower in a specified number of days.

While these procedures are being proposed in this document for the Direct Loan Program, the Secretary intends to study these and other related "cash management" issues (e.g., excess cash and allowable charges to a student's account) further. In the near future, the Secretary intends to propose

a set of regulations that addresses cash management issues in all title IV programs and that will replace the proposals in this document.

Paragraph (c)(3) of this section provides that a school, as a fiduciary for the benefit of the student, may retain loan proceeds for the student in order to assist that student in managing loan funds. The school need not hold the funds in a separate bank account. Rather, the school may maintain these funds in a separately-designated subsidiary account under its general bank account. Funds in this account must be restricted for use by students. The Secretary intends to propose comparable changes for the FFEL Program.

Paragraph (d) specifies the requirements for late disbursements. In general, a school may not make any late disbursement beyond the 60th day after the loan period, or after the student ceases to be enrolled at the school on at least a half-time basis, as applicable. However, a school may make a disbursement within 30 days after the applicable period in documented exceptional circumstances, such as a student's serious, unexpected illness. The Secretary intends to propose a comparable provision for the FFEL Program. Negotiators did not reach agreement on the restrictions on late disbursements in § 685.303(d).

Counseling requirements for schools are found in paragraphs (e) and (f) of this section. The procedures to be used and the information to be provided by the school to the student for both initial and exit counseling are specified in detail. The Secretary will provide materials to schools to assist them in providing entrance and exit counseling. These proposed regulations require that schools provide entrance counseling to most first-time borrowers. They do not require entrance counseling for transfer students who have already borrowed under the FFEL or Direct Loan Program. The procedures and information relating to the exit counseling are, for the most part, required by section 485(b) of the HEA. However, the initial counseling requirements are not specified by the statute. The Secretary proposes to allow schools to follow the initial counseling requirements in these regulations or to develop an alternative plan for initial counseling as part of their quality assurance plans. Under an alternative plan for initial counseling, the school must ensure that most first-time borrowers receive written counseling materials. An alternative plan must also be designed to target students most likely to default and provide them more intensive counseling and support

services. Finally, such a plan must include performance indicators, e.g., the effect of the plan on the number of students in default.

The Secretary specifically invites comments on alternative approaches to initial counseling and what performance indicators should be used to evaluate alternative approaches. The Secretary intends to develop performance standards to be used in evaluating success in initial counseling. When those standards are established, the Secretary may require schools to use them as part of their quality assurance plans. The Secretary may review a school's alternative plan at any time and may require the school to change from its alternative plan to the procedures provided under this section. The Secretary intends to propose comparable changes for initial counseling requirements in the FFEL Program. In addition, the Secretary may provide additional loan counseling to Direct Loan borrowers. The negotiators did not reach agreement on the provisions on initial counseling in § 685.303(e).

Finally, paragraph (g) contains requirements that apply to schools in the treatment of excess loan proceeds.

§ 685.304 Determining the date of a student's withdrawal.

This section states that, for purposes of the Direct Loan Program, a school must determine the date of a student's withdrawal by following the procedures in 34 CFR 668.22(i).

Those procedures govern such a determination for all of the title IV student assistance programs and indicate that a student's withdrawal date generally is the date the student notifies the school of his or her withdrawal, or the date specified by the student, whichever is later. However, if the student drops out without notifying the school or takes an approved leave of absence, the last recorded date of class attendance becomes the withdrawal date. For students in correspondence courses, the date the student submitted his or her last lesson generally becomes the student's withdrawal date.

A school is required to determine a student's withdrawal date within 30 days of the expiration of the student's period of enrollment, academic year, or educational program, whichever is earliest.

§ 685.305 Payment of a refund to the secretary.

Paragraph (a) of this section states that, by applying for a Direct Loan, a borrower authorizes the school to pay that portion of the borrower's refund

that is allocable to a Direct Loan to the Secretary. The school is required to do that and to notify the borrower when it does. Paragraph (b) states that, in determining the portion of the refund that is allocable to a Direct Loan, the school must follow the procedures in 34 CFR 668.22. Those procedures list the order in which a refund must be applied to the various title IV programs, and state that a school shall pay a refund within 30 days of the student's withdrawal date if the student officially withdraws or is expelled. If the student unofficially drops out, the school must pay the refund within 30 days of the date the school determines the student dropped out, the expiration of the academic term in which the student withdrew, or the expiration of the period of enrollment for which the student has been charged, whichever is earliest. The negotiators did not reach agreement on refund procedures in § 685.305(b).

§ 685.306 Withdrawal procedure for schools participating in the Direct Loan Program.

This section allows a school to withdraw from the Direct Loan Program by giving 60 days written notice to the Secretary. The effective date of such a withdrawal is the later of 60 days after the school provides that notice or the date set by the school, unless the Secretary approves an earlier date.

§ 685.307 Remedial actions.

This section describes the remedial actions that the Secretary may take against a school for violation of applicable Federal statutory or regulatory requirements. Paragraph (a) states the circumstances under which the school may be required to repay funds and purchase loans made to its students. Paragraph (b) references the procedures in 34 CFR part 668, Subpart H, which the Secretary follows in requiring the repayment of funds and the purchase of loans in connection with an audit or program review. Paragraph (c) states that the Secretary may impose a fine or take an emergency action against a school or limit, suspend, or terminate a school's participation in the Direct Loan Program using the procedures in 34 CFR part 668, subpart G.

§ 685.308 Administrative and fiscal control and fund accounting requirements for schools participating in the Direct Loan Program.

Paragraph (a) of this section requires a participating school to maintain proper administrative and fiscal procedures and records as set forth in the Direct Loan Program regulations and

in 34 CFR part 668, and to submit all reports required by those regulations. Paragraph (b) details the procedures a school must follow in filing its student status confirmation reports with the Secretary, including the time constraints associated with those reports. A school will receive these reports in either paper or electronic format from the Secretary at least semi-annually. However, beginning with the 1995-1996 academic year, the Secretary will offer schools the option of receiving these reports as often as every 60 days.

The length of time that a school is required to keep records is set forth in paragraph (c), as is the school's responsibility to provide for the retention of those records (and access to them) in the event of such changes in the school's status as closure, loss of eligibility, or change in ownership. The school may keep these records in a number of machine readable formats.

The specific loan record requirements for the program are set forth in paragraph (d). The general inspection requirements, including the types of access required, for these loan records (and all other required records) are addressed in paragraph (e). Paragraph (f) requires the school to provide to the Secretary, upon request, certain information, such as the borrower's name and address, and to notify the Secretary of a borrower's change in permanent address when such a change is discovered.

Paragraph (g) requires the school to establish certain accounting records, maintained in accordance with generally-accepted accounting principles, and paragraph (h) requires the school to establish a separate account as trustee for the Secretary and the borrower for Direct Loan Program funds. Any interest earned on those funds must be returned to the Secretary.

Paragraph (i) states that a school is required to divide the functions of authorizing payment and disbursing funds to borrowers between different offices. Paragraph (j) states that Direct Loan Program funds may be used only to make Direct Loans to eligible borrowers; however, funds received under section 452(b)(1) of the HEA may be used to offset the costs of loan origination.

Subpart D—School Participation and Loan Origination in the Direct Loan Program

§ 685.400 School participation requirements for academic year 1996-1997 and beyond.

On February 17, 1994, the Secretary published standards for participation in the Direct Loan Program for the

academic year beginning July 1, 1995. Under those standards, a school must: (1) Meet the eligibility requirements in section 435(a) of the HEA and (2) have a cohort default rate of less than 25 percent for one of the two most recent years for which default rates are available at the time of the first selection decision following its application (subject to waiver in certain circumstances).

The Secretary is proposing to modify the standards for participation for the academic years beginning July 1, 1996. The Secretary proposes that a school must meet the following standards: (1) Meet the eligibility requirements in section 435(a) of the HEA, including the statutory requirement relating to default rates and (2) not be subject to an emergency action or a proposed or final limitation, suspension, or termination action under sections 428(b)(1)(T), 432(h), or 487(c) of the HEA. The second standard applies to initial eligibility to participate. Once a school is participating, it will not automatically become ineligible due to a proposed or final limitation, suspension, or termination action.

The Secretary proposes these standards for two reasons. First, the Secretary believes that the benefits of the Direct Loan Program should not be available to a school that has lost its eligibility to participate in the FFEL Program. Second, it would not be sound business practice to admit a school into the Direct Loan Program when evidence exists that the school has had problems administering another Federal student aid program.

§ 685.401 Selection criteria and process for academic years 1996-1997 and beyond.

The Secretary proposes two goals for selecting schools to participate in the Direct Loan Program. The first goal is that, to the extent possible, selected schools should be reasonably representative of the schools participating in the FFEL Program on the basis of several listed characteristics. The second goal is that in order to ensure an expeditious but orderly transition from the FFEL Program to the Direct Loan Program, selected schools should make the transition as smooth as possible.

§ 685.402 Criteria for schools to originate loans for academic years 1996-1997 and beyond.

This section sets out the initial criteria participating schools must meet to originate loans. Three types of origination are defined in Subpart A: Standard origination, school origination option 1, and school origination option

2. A discussion of these types of origination follows.

The Department contracts with organizations to assist schools in the origination and servicing of Direct Loans. While these entities may perform both origination and servicing functions, in the proposed regulations they are referred to as "alternative originators" when they perform origination functions for schools and as "servicers" when they perform servicing functions.

Under standard origination, an alternative originator provides a number of services to participating schools. The alternative originator manages both the promissory note and funds management processes for these schools. The alternative originator generates the promissory note based on data transmitted by the school. The alternative originator also sends the promissory note to the borrower and subsequently initiates the transfer of funds to the school prior to the anticipated loan disbursement date.

Under school origination option 1, a participating school is assisted by the Servicer primarily in the management of funds. Under this option, a school is responsible for transmitting completed and signed promissory notes to the Servicer. The Servicer initiates the transfer of funds to the school prior to the anticipated loan disbursement date.

Under school origination option 2, a participating school is responsible for funds management as well as promissory note functions. Under this option, a school is responsible for transmitting completed and signed promissory notes to the Servicer. An option 2 school also requests and obtains loan funds from the Secretary using a process similar to the process for drawing down funds for other Department of Education programs. An option 2 school transmits to the Secretary a specific Direct Loan funding request that is separate from its funding requests for other programs and is based on immediate disbursement needs. Direct Loan capital is tracked separately and cannot be used for purposes other than making Direct Loans. The funds received by an option 2 school that are intended for specific borrowers but are not disbursed to those borrowers may be used for other borrowers. After the first disbursement is made, the school records the actual disbursed amount and the date of the disbursement in the loan origination record and transmits the completed record and promissory note (if not previously submitted) to the Servicer.

Schools participating under origination option 2 will have greater

funds management responsibility than schools participating under origination option 1. Because of this greater responsibility, a school participating under option 2 will receive a higher administrative fee for each borrower than a school participating under option 1. Similarly, schools participating in Direct Loans under options 1 and 2 perform more promissory note functions than schools participating under standard origination. The HEA does not allow schools participating under standard origination to receive administrative fees.

Schools choosing to participate in the Direct Loan Program under either option 1 or 2 will have more control over funds management or promissory note functions, or both, than schools participating under standard origination. However, these options also require schools to assume greater responsibility than those participating in standard origination. Therefore, some schools may choose to participate under standard origination even if they qualify to participate under option 1 or 2.

Because of the greater responsibility that schools assume under option 1 or 2, paragraph (a) establishes stricter criteria for originating schools than for schools participating in standard origination. The criteria are intended to be predictive of an institution's ability to perform the necessary functions to operate as an originator; therefore, many of the criteria pertain to the financial operations of institutions.

Paragraph (a)(2)(iii) requires that originating schools, in the Secretary's opinion, have no severe performance deficiencies for any of the programs under title IV of the HEA, including deficiencies demonstrated by the most recent audit or program review. The Secretary will consider whether performance deficiencies demonstrated in audits or program reviews would affect the school's ability to comply with origination requirements. Examples of severe performance deficiencies that may disqualify a school from origination include, but are not limited to, the school's failure to make title IV refunds, falsification of student records or financial data, improperly disbursed loans resulting in a significant liability to the school, misuse of title IV funds, and failure to meet relevant regulatory standards of administrative capability (such as failure to maintain adequate fiscal records of title IV disbursements). In determining whether schools have severe title IV performance deficiencies, the Secretary will allow schools to demonstrate that past problems have been corrected.

Paragraph (a)(2)(v) states that to be eligible to participate under option 1 or 2, a school must be current on program and financial reports and audits required under title IV of the HEA for the 12-month period immediately preceding its application to participate in the program. Program reports referred to here would include the Institutional Payment Summary (IPS) and the Fiscal Operations Report and Application to Participate (FISAP). Similarly, paragraph (a)(2)(vi) states that, to be eligible to participate under option 1 or 2, a school must be current on Federal cash transaction reports required under title IV for the same 12-month period. These reports include the ED Payment Management System Form 272.

Paragraph (b)(1) permits the Secretary, on a case-by-case basis, to allow a school to originate loans under option 1 or 2 notwithstanding its failure to meet the criteria. Paragraph (b)(2)(i) provides that a school may request to change from option 2 to option 1 or to standard origination, or from option 1 to standard origination, at any time. This provision allows schools that choose to decrease their administrative responsibilities to take advantage of additional assistance from the Servicer or the alternative originator. In addition, paragraph (b)(3) provides that, after one full year of participation in its initial origination status, a school that wishes to increase its administrative responsibilities may apply to move from option 1 to option 2, or from standard origination to option 1 or 2. In reviewing these applications, the Secretary intends to apply criteria and performance standards, including those enumerated in paragraph (b)(3)(iii).

Paragraph (c) provides that, at any time after the determination of a school's initial origination status, the Secretary may require a school to change its origination status if such a change is necessary to ensure program integrity or if the school fails to meet criteria and performance standards established by the Secretary. The Secretary may require a school to convert from origination option 2 to option 1 or standard origination, or from origination option 1 to standard origination.

In evaluating a school's origination performance, the Secretary intends to consider the eligibility criteria listed in § 685.402(a)(2) and additional performance measures. To establish additional performance measures, the Secretary requests input from the community, particularly from schools participating in the Direct Loan Program in academic year 1994-1995. For all schools, the Secretary is considering

developing standards based upon such considerations as the percentage of errors on origination and disbursement records, as well as the timeliness of the submission of such documents. For option 1 and 2 schools, the Secretary is considering additional performance standards based upon the percentage of errors on promissory notes and the timeliness of the submission of these documents. For option 2 schools, the Secretary is considering developing quantitative measures of funds management performance, based on the amount of a school's excess cash and the timeliness and accuracy of a school's drawdown request.

Paragraph (e) of this section provides that a school may request a change in the Servicer performing origination or servicing functions. The Secretary would grant a school's request if the Secretary determined that the school's claim of unsatisfactory performance by its current Servicer was accurate and substantial and the change could be accommodated by the Servicer requested by the school. Examples of a substantial claim include a pattern of failure to process promissory notes in a timely manner, significant and repeated errors in handling and reviewing school transmissions of student data, repeated late billing of borrowers, inability to process payments in a timely fashion, and inability to track the status of borrower accounts. The Secretary recognizes that high quality servicing will be a key factor in the success of the Direct Loan Program. Therefore, the Secretary is committed to promoting high-quality servicing and to including institutional choice in servicing arrangements if institutions receive unsatisfactory Servicer performance. To meet these goals, the Secretary intends to encourage competition among servicers. To that end, the Secretary will solicit proposals and attempt to award contracts to more servicers than would be immediately necessary to handle servicing volumes. This will allow the flexibility necessary to terminate contracts due to poor performance. The origination contractor will be encouraged to propose methods that will allow for similar competition among subcontractors or origination sites.

Executive Order 12866

1. Assessment of Costs and Benefits

These proposed regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this proposed regulatory action.

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering the title IV, HEA programs effectively and efficiently. Burdens specifically associated with information collection requirements, if any, are explained elsewhere in this preamble under the heading of *Paperwork Reduction Act of 1980*.

In assessing the potential costs and benefits—both quantitative and qualitative—of these proposed regulations, the Secretary has determined that the benefits of the proposed regulations justify the costs. A further discussion of the benefits and costs of the proposed regulations is contained in the summary of the provisions proposed.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

To assist the Department in complying with the specific requirements of Executive Order 12866, the Secretary invites comment on whether there may be further opportunities to reduce any potential costs or increase potential benefits resulting from these proposed regulations without impeding the effective and efficient administration of the title IV, HEA programs.

2. Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these regulations easier to understand, including answers to questions such as the following: (1) Are the requirements in the regulations clearly stated? (2) Do the regulations contain technical terms or other wording that interferes with their clarity? (3) Does the format of the regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity? Would the regulations be easier to understand if they were divided into more (but shorter) sections? (A "section" is preceded by the symbol "\$" and a numbered heading; for example, § 685.200 *Borrower eligibility*.) (4) Is the description of the proposed regulations in the "Supplementary Information" section of this preamble helpful in the understanding of the proposed regulations? How could this description be more helpful in making the proposed regulations easier to understand? (5) What else could the Department do to

make the regulations easier to understand?

A copy of any comments that concern whether these proposed regulations are easy to understand should also be sent to Stanley Cohen, Regulations Quality Officer, U.S. Department of Education, 400 Maryland Avenue, SW., (Room 5125 FOB-6), Washington, DC 20202-2241.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. The small entities that would be affected by these regulations are institutions of higher education. Many provisions of the proposed regulations repeat statutory requirements. Certain reporting, recordkeeping, and compliance requirements are imposed by the regulations. However, these requirements are modeled on existing regulations for other Federal student financial aid programs. Institutions of higher education are therefore familiar with these requirements, and the regulations would not have a significant additional impact on these institutions.

Paperwork Reduction Act of 1980

Sections 685.204, 685.206, 685.209, 685.213, 685.214, 685.215, 685.301, 685.302, 685.303, 685.308 and 685.401 contain information collection requirements. As required by the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of these proposed regulations to the Office of Management and Budget (OMB) for its review. (44 U.S.C. 3504(h))

These proposed regulations affect students who apply for Federal student financial assistance authorized by title IV of the Higher Education Act of 1965, as amended, and postsecondary institutions administering the Direct Loan Program. Annual public reporting burden for this collection of information is estimated to average 29 minutes for each of the estimated 2,483,906 individuals providing information regarding eligibility for a loan, deferment, income-contingent repayment, or a Direct Consolidation Loan (or 1,200,554 hours total) and 12 minutes for a postsecondary institution for each of the estimated 4,068,121 responses relating to postsecondary institutions' administration of a student loan program (or 813,624 hours total) including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Daniel J. Chenok.

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations. All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in room 4624, Regional Office Building 3, 7th and D Streets, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Monday through Friday of each week except Federal holidays.

To expedite ED's review and response, comments should be identified by specific sections of the NPRM and presented sequentially.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 685

Administrative practice and procedure, Colleges and universities, Education, Loan programs-education, Reporting and recordkeeping requirements, Student aid, Vocational education.

(Catalog of Federal Domestic Assistance Number 84.268, Federal Direct Student Loan Program)

Dated: August 1, 1994.

Richard W. Riley,
Secretary of Education.

The Secretary proposes to revise part 685 of title 34 of the Code of Federal Regulations to read as follows:

PART 685—FEDERAL DIRECT STUDENT LOAN PROGRAM

Subpart A—Purpose and Scope

Sec.

685.100 The Federal Direct Student Loan Program.

685.101 Participation in the Direct Loan Program.

685.102 Definitions.

685.103 Applicability of subparts.

Subpart B—Borrower Provisions

685.200 Borrower eligibility.

685.201 Obtaining a loan.

685.202 Charges for which Direct Loan Program borrowers are responsible.

685.203 Loan limits.

685.204 Deferral.

685.205 Forbearance.

685.206 Borrower responsibilities and defenses.

685.207 Obligation to repay.

685.208 Repayment plans.

685.209 Income contingent repayment plan.

685.210 Choice of repayment plan.

685.211 Miscellaneous repayment provisions.

685.212 Discharge of a loan obligation.

685.213 Closed school discharge.

685.214 Discharge for false certification of student eligibility or unauthorized payment.

685.215 Consolidation.

Subpart C—Requirements, Standards, and Payments for Direct Loan Program Schools

685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.

685.301 Certification of a loan by a Direct Loan Program school.

685.302 Schedule requirements for courses of study by correspondence.

685.303 Processing loan proceeds and counseling borrowers.

685.304 Determining the date of a student's withdrawal.

685.305 Payment of a refund to the Secretary.

685.306 Withdrawal procedure for schools participating in the Direct Loan Program.

685.307 Remedial actions.

685.308 Administrative and fiscal control and fund accounting requirements for schools participating in the Direct Loan Program.

Subpart D—School Participation and Loan Origination in the Direct Loan Program

685.400 School participation requirements for academic years 1996–1997 and beyond.

685.401 Selection criteria and process for academic years 1996–1997 and beyond.

685.402 Criteria for schools to originate loans for academic years 1996–1997 and beyond.

Appendix A—Income Contingent Repayment Examples of the Calculation of Monthly Repayment Amounts

Authority: 20 U.S.C. 1087a et seq.

Subpart A—Purpose and Scope

§ 685.100 The Federal Direct Student Loan Program.

(a) Under the Federal Direct Student Loan Program (Direct Loan Program), the Secretary makes loans to enable a student or parent to pay the costs of the student's attendance at a postsecondary school. This part governs the Federal Direct Stafford Loan Program, the Federal Direct Unsubsidized Stafford Loan Program, the Federal Direct PLUS Program, and the Federal Direct Consolidation Loan Program. The Secretary makes loans under the following program components:

(1) Federal Direct Stafford Loan Program, which provides loans to undergraduate, graduate, and professional students. The Secretary subsidizes the interest while the borrower is in an in-school, grace, or deferment period.

(2) Federal Direct Unsubsidized Stafford Loan Program, which provides loans to undergraduate, graduate and professional students. The borrower is responsible for the interest that accrues during any period.

(3) Federal Direct PLUS Program, which provides loans to parents of dependent students. The borrower is responsible for the interest that accrues during any period.

(4) Federal Direct Consolidation Loan Program, which provides loans to borrowers to consolidate certain Federal educational loans.

(b) The Secretary makes a Direct Subsidized Loan, a Direct Unsubsidized Loan, or a Direct PLUS Loan only to a student or a parent of a student enrolled in a school that has been selected by the Secretary to participate in the Direct Loan Program.

(c) The Secretary makes a Direct Consolidation Loan only to—

(1) A borrower with a loan made under the Direct Loan Program; or

(2) A borrower with a loan made under the Federal Family Education Loan Program who is not able to receive—

(i) A Federal Consolidation Loan; or
(ii) A Federal Consolidation Loan with income-sensitive repayment terms that are satisfactory to the borrower.

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.101 Participation in the Direct Loan Program.

(a)(1) Colleges, universities, graduate and professional schools, vocational, and proprietary schools selected by the Secretary may participate in the Direct Loan Program. Participation in the Direct Loan Program enables an eligible student or parent to obtain a loan to pay for the student's cost of attendance at the school.

(2) The Secretary may permit a school to participate in both the Federal Family Education Loan (FFEL) Program, as defined in 34 CFR Part 600, and the Direct Loan Program. A school permitted to participate in both the FFEL Program and the Direct Loan Program may certify loan applications under the FFEL Program according to the terms of its agreement with the Secretary.

(b) An eligible student who is enrolled at a school participating in the Direct Loan Program may borrow under the Federal Direct Stafford Loan and

Federal Direct Unsubsidized Stafford Loan Programs. An eligible parent of an eligible dependent student enrolled at a school participating in the Direct Loan Program may borrow under the Federal Direct PLUS Program.

(Authority: 20 U.S.C. 1087a *et seq.*)

§ 685.102 Definitions.

(a)(1) The following definitions are set forth in the Student Assistance General Provisions, 34 CFR Part 668:

Academic year
Campus-based programs
Dependent student
Eligible program
Eligible student
Enrolled
Federal Consolidation Loan Program
Federal Direct Student Loan Program
(Direct Loan Program)
Federal Pell Grant Program
Federal Perkins Loan Program
Federal PLUS Program
Federal State Student Incentive Grant Program
Federal Supplemental Educational Opportunity Grant Program
Federal Work-Study Program
Independent student
One-third of an academic year
Parent
State
Two-thirds of an academic year
U.S. citizen or national

(2) The following definitions are set forth in the regulations for Institutional Eligibility under the Higher Education Act of 1965, as amended, 34 CFR Part 600:

Accredited
Clock hour
Educational program
Eligible institution
Federal Family Education Loan (FFEL) Program
Institution of higher education
Nationally recognized accrediting agency or association
Preaccredited
Program of study by correspondence
Secretary

(3) The following definitions are set forth in the regulations for the Federal Family Education Loan Program (FFEL) Program, 34 CFR Part 682:

Act
Endorser
Expected family contribution
Federal Insured Student Loan (FISL) Program
Federal Stafford Loan Program
Foreign school
Full-time student
Graduate or professional student
Guaranty agency
Holder
Legal guardian

Lender
Totally and permanently disabled Undergraduate student

(b) The following definitions also apply to this part:

Alternative originator: An entity under contract with the Secretary that originates Direct Loans to students and parents of students who attend a Direct Loan Program school that does not originate loans.

Consortium: For purposes of this part, a consortium is a group of two or more schools that interacts with the Secretary in the same manner as other schools, except that the communication between the Secretary and the schools is channeled through a single point. Each school in a consortium shall sign a Direct Loan Program participation agreement with the Secretary and be responsible for the information it supplies through the consortium.

Default: The failure of a borrower and endorser, if any, to make an installment payment when due, or to meet other terms of the promissory note, if the Secretary finds it reasonable to conclude that the borrower and endorser, if any, no longer intend to honor the obligation to repay, provided that this failure persists for—

(1) 180 days for a loan repayable in monthly installments; or

(2) 240 days for a loan repayable in less frequent installments.

Disbursement: (1) Except for a Direct Consolidation Loan, the delivery by a school of an installment of a loan to a borrower. The disbursement date is the earliest date when the proceeds are applied to a student's account or when the proceeds are made available to the borrower.

(2) For a Direct Consolidation Loan, disbursement is the payment by the Secretary to the holder or holders of the underlying loans and occurs when the Direct Consolidation Loan is made.

Estimated financial assistance: (1) The estimated amount of assistance that a student will receive from Federal, State, institutional, or other sources for a period of enrollment. Types of assistance include scholarships, grants, financial need-based employment, or loans, such as—

(i) Benefits paid under section 156 of title 42 of the United States Code (formerly Social Security Benefits);

(ii) Veterans' educational benefits paid under chapters 30, 31, 32, and 35 of title 38 of the United States Code;

(iii) Educational benefits paid under chapters 106 and 107 of title 10 of the United States Code (Selected Reserve Educational Assistance Program);

(iv) Reserve Officer Training Corps (ROTC) scholarships and subsistence

allowances awarded under chapter 2 of title 10 and chapter 2 of title 37 of the United States Code;

(v) Benefits paid under Public Law 97-376, section 156: Restored Entitlement Program for Survivors (or Quayle benefits);

(vi) Benefits paid under Public Law 96-342, section 903: Educational Assistance Pilot Program;

(vii) Any educational benefits paid because of enrollment in a postsecondary education institution;

(viii) The estimated amount of other Federal student financial aid, including but not limited to a Direct Subsidized Loan, a Direct Unsubsidized Loan, a Federal Pell Grant, and campus-based aid;

(ix) In the case of a Direct PLUS Loan, the estimated amount of other Federal student financial aid, including but not limited to, a Direct Subsidized Loan, a Direct Unsubsidized Loan, a Federal Pell Grant, and campus-based aid; and

(x) If the student is applying for a loan to cover expenses incurred within the same enrollment period as that for which a prior Federal or non-Federal student loan was received, the amount of loan proceeds withheld by the Secretary, lender, or guaranty agency making or insuring the loan if those costs were included in computing the borrower's estimated cost of attendance for the prior loan.

(2) Estimated financial assistance does not include—

(i) Those amounts used to replace the expected family contribution, including—

(A) Direct PLUS Loan amounts;

(B) Direct Unsubsidized Loan amounts; and

(C) Non-Federal loan amounts; and

(ii) Federal Perkins loan and Federal Work-Study funds that the student has declined.

Federal Direct Consolidation Loan Program: A loan program authorized by title IV, part D of the Act that provides loans to borrowers who consolidate certain Federal educational loans, and one of the components of the Direct Loan Program. Loans made under this program are referred to as Direct Consolidation Loans. There are three types of Direct Consolidation Loans:

(1) Direct Subsidized Consolidation Loans. Subsidized title IV education loans may be consolidated into a Direct Subsidized Consolidation Loan. Interest is not charged to the borrower during in-school and deferment periods.

(2) Direct Unsubsidized Consolidation Loans. Certain Federal education loans may be consolidated into a Direct Unsubsidized Consolidation Loan. The

borrower is responsible for the interest that accrues during any period.

(3) **Direct PLUS Consolidation Loans.** Parent Loans for Undergraduate Students, Federal PLUS, Direct PLUS, and Direct PLUS Consolidation Loans may be consolidated into a Direct PLUS Consolidation Loan. The borrower is responsible for the interest that accrues during any period.

Federal Direct PLUS Program: A loan program authorized by title IV, part D of the Act that provides loans to parents of dependent students attending schools that participate in the Direct Loan Program, and one of the components of the Direct Loan Program. The borrower is responsible for the interest that accrues during any period. Loans made under this program are referred to as Direct PLUS Loans.

Federal Direct Stafford Loan Program: A loan program authorized by title IV, part D of the Act that provides loans to undergraduate, graduate, and professional students attending Direct Loan Program schools, and one of the components of the Direct Loan Program. The Secretary subsidizes the interest while the borrower is in an in-school, grace, or deferment period. Loans made under this program are referred to as Direct Subsidized Loans.

Federal Direct Unsubsidized Stafford Loan Program: A loan program authorized by title IV, part D of the Act that provides loans to undergraduate, graduate, and professional students attending Direct Loan Program schools, and one of the components of the Direct Loan Program. The borrower is responsible for the interest that accrues during any period. Loans made under this program are referred to as Direct Unsubsidized Loans.

Grace period: A six-month period that begins on the day after a Direct Loan Program borrower ceases to be enrolled as at least a half-time student at an eligible institution and ends on the day before the repayment period begins.

Half-time student: A student who is not a full-time student and who is enrolled in a school participating in the FFEL Program or the Direct Loan Program and is carrying an academic workload that is at least one-half the workload of a full-time student, as determined by the school. A student enrolled solely in an eligible program of study by correspondence is considered a half-time student.

Interest rate: The annual interest rate that is charged on a loan, under title IV, part D of the Act.

Loan fee: A fee, payable by the borrower, that is used to help defray the costs of the Direct Loan Program.

Period of enrollment: The period for which a Direct Subsidized, Direct Unsubsidized, or Direct PLUS Loan is intended. The period of enrollment must coincide with one or more academic terms established by the school (such as semester, trimester, quarter, academic year, and length of the program of study), for which institutional charges are generally assessed. The period of enrollment is also referred to in this part as the loan period.

Satisfactory repayment arrangement. The making of six consecutive, voluntary, on-time, full monthly payments on a defaulted loan to regain further eligibility for student aid under title IV of the Act. The required monthly payment amount may not be more than is reasonable and affordable based on the borrower's total financial circumstances. "On-time" means a payment made within 15 days of the scheduled due date, and voluntary payments are those payments made directly by the borrower, regardless of whether there is a judgment against the borrower, and do not include payments obtained by income tax offset, garnishment, or income or asset execution.

School origination option 1: The process by which a school creates a loan origination record, transmits the record to the Servicer, prepares the promissory note, obtains a completed and signed promissory note from a borrower, transmits the promissory note to the Servicer, receives the funds electronically, disburses a loan to a borrower, creates a disbursement record, transmits the disbursement record to the Servicer, and reconciles on a monthly basis. The Servicer initiates the drawdown of funds for schools participating in school origination option 1.

School origination option 2: The process by which a school creates a loan origination record, transmits the record to the Servicer, prepares the promissory note, obtains a completed and signed promissory note from a borrower, transmits the promissory note to the Servicer, determines funding needs, initiates the drawdown of funds, receives the funds electronically, disburses a loan to a borrower, creates a disbursement record, transmits the disbursement record to the Servicer, and reconciles on a monthly basis.

Servicer: An entity that has contracted with the Secretary to act as the Secretary's agent in providing services relating to the origination or servicing of Direct Loans.

Standard origination: The process by which a school creates a loan

origination record, transmits the record to the alternative originator, receives the funds electronically, disburses funds, creates a disbursement record, transmits the disbursement record to the alternative originator, and reconciles on a monthly basis. The alternative originator prepares the promissory note, obtains a completed and signed promissory note from a borrower, and initiates the drawdown of funds for schools participating in standard origination.

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.103 Applicability of subparts.

(a) Subpart A contains general provisions regarding the purpose and scope of the Direct Loan Program.

(b) Subpart B contains provisions regarding borrowers in the Direct Loan Program.

(c) Subpart C contains certain requirements regarding schools in the Direct Loan Program.

(d) Subpart D contains provisions regarding school eligibility for participation and origination in the Direct Loan Program.

(Authority: 20 U.S.C. 1087a et seq.)

Subpart B—Borrower Provisions

§ 685.200 Borrower eligibility.

(a) **Student borrower.** (1) A student is eligible to receive a Direct Subsidized Loan, a Direct Unsubsidized Loan, or a combination of these loans, if the student meets the following requirements:

(i) The student is enrolled in a school that participates in the Direct Loan Program.

(ii) The student meets the requirements for an eligible student under 34 CFR Part 668.

(iii) In the case of an undergraduate student who seeks a Direct Subsidized Loan or a Direct Unsubsidized Loan at a school that participates in the Federal Pell Grant Program, the student has received a determination of Federal Pell Grant eligibility for the period of enrollment for which the loan is sought.

(iv)(A) The student reaffirms any FFEL Program or Direct Loan Program debt that previously was discharged in bankruptcy.

(B) For purposes of paragraph (a)(1)(iv)(A) of this section, a reaffirmation is an acknowledgement of the loan by the borrower in a legally binding manner. The acknowledgement may include, but is not limited to, the borrower's—

(1) Signing a new promissory note or repayment schedule; or

(2) Making a payment on the loan.

(v) In the case of a borrower whose previous loan was cancelled due to total and permanent disability, the student—

(A) Obtains a certification from a physician that the borrower is able to engage in substantial gainful activity; and

(B) Signs a statement acknowledging that the Direct Loan the borrower receives cannot be cancelled in the future on the basis of any impairment present when the new loan is made, unless that impairment substantially deteriorates.

(vi) In the case of any student who seeks a loan but does not have a certificate of graduation from a school providing secondary education or the recognized equivalent of such a certificate, the student—

(A) Has passed an independently administered examination approved by the Secretary; or

(B) Has been determined to have the ability to benefit from the program in accordance with a State process approved by the Secretary.

(2)(i) A Direct Subsidized Loan borrower must demonstrate financial need in accordance with title IV, part F of the Act.

(ii) The Secretary considers a member of a religious order, group, community, society, agency, or other organization who is pursuing a course of study at an institution of higher education to have no financial need if that organization—

(A) Has as its primary objective the promotion of ideals and beliefs regarding a Supreme Being;

(B) Requires its members to forego monetary or other support substantially beyond the support it provides; and

(C) Directs the member to pursue the course of study; or

(2) Provides subsistence support to its members.

(b) *Parent borrower.* A parent is eligible to receive a Direct PLUS Loan if the parent meets the following requirements:

(1) The parent is borrowing to pay for the educational costs of a dependent undergraduate student who meets the requirements for an eligible student under 34 CFR Part 668.

(2) The parent provides his or her and the student's social security number.

(3) The parent meets the requirements pertaining to citizenship and residency that apply to the student under 34 CFR 668.7.

(4) The parent meets the requirements concerning defaults and overpayments that apply to the student in 34 CFR 668.7.

(5) The parent complies with the requirements for submission of a Statement of Educational Purpose that

apply to the student under 34 CFR Part 668, except for the completion of a Statement of Selective Service Registration Status.

(6) The parent meets the requirements that apply to a student under paragraphs (a)(1)(iv) and (v) of this section.

(7)(i) The parent—

(A) Does not have an adverse credit history;

(B) Has an adverse credit history but has obtained an endorser who does not have an adverse credit history; or

(C) Has an adverse credit history but documents to the satisfaction of the Secretary that extenuating circumstances exist.

(ii) For purposes of paragraph (b)(7)(i) of this section, an adverse credit history means that as of the date of the credit report, the applicant—

(A) Is 90 or more days delinquent on any debt; or

(B) Has been the subject of a default determination, bankruptcy discharge, foreclosure, repossession, tax lien, wage garnishment, or write-off of a debt under title IV of the Act during the five years preceding the date of the credit report.

(c) *Defaulted FFEL Program and Direct Loan borrowers.* Except as noted in § 685.215(d)(1)(ii)(E), in the case of a student or parent borrower who is currently in default on an FFEL Program or a Direct Loan Program Loan, the borrower shall make satisfactory repayment arrangements on the defaulted loan. The definition of a satisfactory repayment arrangement is provided in 34 CFR 685.102.

(d) *Use of loan proceeds to replace expected family contribution.* A borrower may use the amount of a Direct Unsubsidized Loan, a Direct PLUS Loan, a State-sponsored loan, or another non-Federal loan obtained for a loan period to replace the expected family contribution for that loan period.

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.201 Obtaining a loan.

(a) *Application for a Direct Subsidized Loan or a Direct Unsubsidized Loan.* (1) To obtain a Direct Subsidized Loan or a Direct Unsubsidized Loan, a student shall complete a Free Application for Federal Student Aid and submit it in accordance with instructions in the application.

(2) If the student is eligible for a Direct Subsidized Loan or a Direct Unsubsidized Loan, the school in which the student is enrolled shall perform the following functions:

(i) A school participating under school origination option 2 shall create a loan origination record, obtain a completed promissory note from the

student, draw down funds, and disburse the funds.

(ii) A school participating under school origination option 1 shall create a loan origination record, obtain a completed promissory note from the student, and transmit the record and promissory note to the Servicer. The Servicer initiates the drawdown of funds, and the school disburses the funds.

(iii) If the student is attending a school participating under standard origination, the school shall create a loan origination record and transmit the record to the alternative originator, which prepares the promissory note and sends it to the student and receives the completed promissory note from the student. The Servicer initiates the drawdown of funds, and the school disburses the funds.

(b) *Application for a Direct PLUS Loan.* To obtain a Direct PLUS Loan, the parent shall complete the application/ promissory note and submit it to the school at which the student is enrolled. The school shall complete its portion of the application/ promissory note and submit it to the Servicer, which makes a determination as to whether the parent has an adverse credit history. A school participating under school origination option 2 shall draw down funds and disburse the funds. For a school participating under school origination option 1 or standard origination, the Servicer initiates the drawdown of funds, and the school disburses the funds.

(c) *Application for a Direct Consolidation Loan.* (1) To obtain a Direct Consolidation Loan, the applicant shall complete the application/ promissory note and submit it to the Servicer. The application/ promissory note sets forth the terms and conditions of the Direct Consolidation Loan and informs the applicant how to contact the Servicer. The Servicer answers questions regarding the process of applying for a Direct Consolidation Loan and provides information about the terms and conditions of both Direct Consolidation Loans and the types of loans that may be consolidated. (2) Once the applicant has submitted the completed application/ promissory note to the Servicer, the Secretary makes the Direct Consolidation Loan under the procedures specified in § 685.215.

(Authority: 20 U.S.C. 1087a et seq., 1091a)

§ 685.202 Charges for which Direct Loan Program borrowers are responsible.

(a) *Interest.*—(1) *Interest rate for Direct Subsidized Loans and Direct Unsubsidized Loans.* (i) For Direct Subsidized Loans and Direct

Unsubsidized Loans in repayment, the interest rate during any twelve-month period beginning on July 1 and ending on June 30 is determined on the June 1 immediately preceding that period. The interest rate is equal to the bond equivalent rate of 91-day Treasury bills auctioned at the final auction held prior to that June 1 plus 3.1 percentage points, but does not exceed 8.25 percent.

(ii) For Direct Subsidized Loans and Direct Unsubsidized Loans prior to the beginning of the repayment period or during the period of deferment under § 685.204, the interest rate during any twelve-month period beginning on July 1 and ending on June 30, is determined on the June 1 immediately preceding that period. The interest rate is equal to the bond equivalent rate of 91-day Treasury bills auctioned at the final auction held prior to that June 1; plus 2.5 percentage points, but does not exceed 8.25 percent.

(2) *Interest rate for the Direct PLUS Loans.* The interest rate on a Direct PLUS Loan during any twelve-month period beginning on July 1 and ending on June 30 is determined on the June 1 preceding that period. The interest rate is equal to the bond equivalent rate of 52-week Treasury bills auctioned at the final auction held prior to that June 1 plus 3.1 percentage points, but does not exceed 9 percent.

(b) *Capitalization.* (1) The Secretary may add accrued interest to the borrower's unpaid principal balance. This increase in the principal balance of a loan is called "capitalization."

(2) For a Direct Unsubsidized Loan, the Secretary capitalizes the interest that accrues on the loan when the borrower enters repayment.

(3) For a Direct Loan not eligible for interest subsidies during periods of deferment, and for all Direct Loans during periods of forbearance, the Secretary capitalizes the interest that has accrued on the loan upon the expiration of the deferment or forbearance.

(4) If a borrower is in a period of deferment, forbearance, or the in-school or grace period on a Direct Loan and agrees to monthly or quarterly payments of interest, the Secretary notifies the borrower that the borrower's failure to resolve any delinquency constitutes the borrower's consent to capitalization of delinquent interest and all interest that accrues through the remainder of that period. The Secretary capitalizes the interest that has accrued on the loan upon the expiration of that period.

(5) Except as provided in § 685.209(d)(3) and in the case of a Direct Unsubsidized Loan borrower who

has not entered repayment, is in deferment, or in forbearance, the Secretary annually capitalizes interest payable by the borrower when the borrower does not make payments sufficient to cover the interest that has accrued on the loan.

(c) *Loan fee for Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans.* The Secretary—

(1) Charges a borrower a loan fee of four percent of the principal amount of the loan on a Direct Subsidized, Direct Unsubsidized, or Direct PLUS Loan;

(2) Deducts the loan fee from the proceeds of the loan;

(3) In the case of a loan disbursed in multiple installments, deducts a pro rated portion of the fee from each disbursement; and

(4) Applies to a borrower's loan balance the portion of the loan fee previously deducted from the loan that is attributable to a disbursement of the loan that is repaid within 120 days of disbursement or that should have been repaid within that period by the school.

(d) *Late charge.* (1) The Secretary may require the borrower to pay a late charge of up to six cents for each dollar of each installment or portion thereof that is late under the circumstances described in paragraph (d)(2) of this section.

(2) The late charge may be assessed if the borrower fails to pay all or a portion of a required installment payment within 30 days after it is due.

(e) (1) *Collection charges before default.* Notwithstanding any provision of State law, the Secretary may require that the borrower or any endorser pay costs incurred by the Secretary or the Secretary's agents in collecting installments not paid when due. These charges do not include routine collection costs associated with preparing letters or notices or with making personal contacts with the borrower (e.g., local and long-distance telephone calls).

(2) *Collection charges after default.* If a borrower defaults on a Direct Loan, the Secretary assesses collection costs on the basis of 34 CFR 30.60.

(Authority: 20 U.S.C. 1087a et seq., 1091a)

§ 685.203 Loan limits.

(a) *Direct Subsidized Loans.* (1) In the case of an undergraduate student who has not successfully completed the first year of a program of undergraduate education, the total amount the student may borrow for any academic year of study under the Federal Direct Stafford Loan Program in combination with the Federal Stafford Loan Program may not exceed the following:

(i) \$2,625 for a program of study of at least a full academic year in length.

(ii) \$1,750 for a program of study of at least two-thirds but less than a full academic year in length.

(iii) \$875 for a program of study of at least one-third but less than two-thirds of an academic year in length.

(2) In the case of an undergraduate student who has successfully completed the first year of an undergraduate program but has not successfully completed the second year of an undergraduate program, the total amount the student may borrow for any academic year of study under the Federal Direct Stafford Loan Program in combination with the Federal Stafford Loan Program may not exceed the following:

(i) \$3,500 for a program of study of at least a full academic year in length.

(ii) If the student is enrolled in a program of study with less than a full academic year remaining, an amount that bears the same ratio to \$3,500 as the number of semester, trimester, quarter, or clock hours for which the student enrolls bears to one academic year.

(3) In the case of an undergraduate student who has successfully completed the first and second year of a program of study of undergraduate education but has not successfully completed the remainder of the program, or in the case of a student in a program who has an associate or baccalaureate degree which is required for admission into the program, the total amount the student may borrow for any academic year of study under the Federal Direct Stafford Loan Program in combination with the Federal Stafford Loan Program may not exceed the following:

(i) \$5,500 for a program of study of at least an academic year in length.

(ii) For a student enrolled in a program of study with less than a full academic year remaining, an amount that bears the same ratio to \$5,500 as the number of semester, trimester, quarter, or clock hours for which the student enrolls bears to one academic year.

(4) In the case of a graduate or professional student, the total amount the student may borrow for any academic year of study under the Federal Direct Stafford Loan Program in combination with the Federal Stafford Loan Program may not exceed \$8,500.

(b) *Direct Unsubsidized Loans.* The total amount a student may borrow under any period of study for the Federal Direct Unsubsidized Loan Program and the Federal Unsubsidized Stafford Loan Program is the same as the amount determined under paragraph (a) of this section, less any amount received under the Federal Direct Stafford Loan Program or the Federal Stafford Loan Program.

(c) *Additional eligibility for Direct Unsubsidized Loans.* (1)(i) An independent undergraduate student, graduate or professional student, and certain dependent undergraduate students may borrow amounts under the Federal Direct Unsubsidized Loan Program in addition to any amount borrowed under paragraph (b) of this section.

(ii) In order for a dependent undergraduate student to receive this additional loan amount, the financial aid administrator must determine that the student's parents likely will be precluded by exceptional circumstances from borrowing under the Federal Direct PLUS Program or the Federal PLUS Program and the student's family is otherwise unable to provide the student's expected family contribution. The financial aid administrator shall base the determination on a review of the family financial information provided by the student and consideration of the student's debt burden and shall document the determination in the school's file.

(iii) "Exceptional circumstances" under paragraph (c)(1)(ii) of this section include but are not limited to circumstances in which the student's parent receives only public assistance or disability benefits, the parent is incarcerated, the parent has an adverse credit history, or the parent's whereabouts are unknown. A parent's refusal to borrow a Federal PLUS Loan or Direct PLUS Loan does not constitute "exceptional circumstances."

(2) The additional amount that a student described in paragraph (c)(1)(i) of this section may borrow under the Federal Direct Unsubsidized Loan Program and the Federal Unsubsidized Stafford Loan Program, for any academic year of study may not exceed the following:

(i) In the case of a student who has not successfully completed the first and second year of a program of undergraduate education—

(A) \$4,000 for enrollment in a program of study of at least a full academic year in length;

(B) \$2,500 for enrollment in a program of study of at least two-thirds but less than a full academic year in length; and

(C) \$1,500 for enrollment in a program of study of at least one-third but less than two-thirds of an academic year in length.

(ii) In the case of a student who has successfully completed the first and second year of an undergraduate program but has not completed the remainder of the program of study—

(A) For a student enrolled in a program of study of at least a full academic year, \$5,000; and

(B) For a student enrolled in a program of study with less than a full academic year remaining, an amount that bears the same ratio to \$5,000 as the number of semester, trimester, quarter, or clock hours for which the student enrolls bears to one academic year.

(iii) In the case of a graduate or professional student, \$10,000.

(d) *Federal Direct Stafford Loan Program and Federal Stafford Loan Program aggregate limits.* The aggregate unpaid principal amount of all Direct Subsidized Loans and Federal Stafford Loans made to a student may not exceed the following:

(1) \$23,000 in the case of any student who has not successfully completed a program of study at the undergraduate level.

(2) \$65,500 in the case of a graduate or professional student, including loans for undergraduate study.

(e) *Aggregate limits for unsubsidized loans.* The total amount of Direct Unsubsidized Loans, Federal Unsubsidized Stafford Loans, and Federal SLS Loans may not exceed the following:

(1) For a dependent undergraduate student, \$23,000 minus any Direct Subsidized Loan and Federal Stafford Loan amounts, unless the student qualifies under paragraph (c) of this section for additional eligibility or qualified for that additional eligibility under the Federal SLS Program.

(2) For an independent undergraduate or a dependent undergraduate who qualifies for additional eligibility under paragraph (c) of this section or qualified for this additional eligibility under the Federal SLS Program, \$46,000 minus any Direct Subsidized Loan and Federal Stafford Loan amounts.

(3) For a graduate or professional student, \$138,500 including any loans for undergraduate study, minus any Direct Subsidized Loan, Federal Stafford Loan, and SLS Program loan amounts.

(f) *Direct PLUS Loans annual limit.* The total amount of all Direct PLUS Loans that a parent or parents may borrow on behalf of each dependent student for any academic year of study may not exceed the cost of attendance minus other estimated financial assistance for that student.

(g) *Direct PLUS Loans aggregate limit.* The total amount of all Direct PLUS Loans that a parent or parents may borrow on behalf of each dependent student for enrollment in an eligible program of study may not exceed the student's cost of attendance minus other estimated financial assistance for that

student for the entire period of enrollment.

(h) *Loan limit period.* The annual loan limits apply to an academic year.

(i) *Treatment of Direct Consolidation Loans and Federal Consolidation Loans.* The percentage of the outstanding balance on Direct Consolidation Loans or Federal Consolidation Loans counted against a borrower's aggregate loan limits is calculated as follows:

(1) For Direct Subsidized Loans, the percentage equals the percentage of the original amount of the Direct Consolidation Loan or Federal Consolidation Loan attributable to the Direct Subsidized and Federal Stafford Loans.

(2) For Direct Unsubsidized Loans, the percentage equals the percentage of the original amount of the Direct Consolidation Loan or Federal Consolidation Loan attributable to the Direct Unsubsidized, SLS, and Federal Unsubsidized Stafford Loans.

(j) *Maximum loan amounts.* In no case may a Direct Subsidized, Direct Unsubsidized, or Direct PLUS Loan amount exceed the student's estimated cost of attendance for the period of enrollment for which the loan is intended, less—

(1) The student's estimated financial assistance for that period; and

(2) In the case of a Direct Subsidized Loan, the borrower's expected family contribution for that period.

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.204 Deferment.

(a)(1) A Direct Loan borrower whose loan is eligible for interest subsidies and who meets the requirements described in paragraph (b) of this section is eligible for a deferment during which periodic installments of principal and interest need not be paid.

(2) A Direct Loan borrower whose loan is not eligible for interest subsidies and who meets the requirements described in paragraph (b) of this section is eligible for a deferment during which periodic installments of principal need not be paid but interest does accrue and is capitalized or paid by the borrower.

(b) Except as provided in paragraph (d) of this section, a Direct Loan borrower is eligible for a deferment during any period during which the borrower meets any of the following requirements:

(1)(i) The borrower—

(A) Is carrying at least one-half the normal full-time work load for the course of study that the borrower is pursuing, as determined by the eligible school the borrower is attending;

(B) Is pursuing a course of study pursuant to a graduate fellowship program approved by the Secretary; or

(C) Is pursuing a rehabilitation training program, approved by the Secretary, for individuals with disabilities; and

(ii) The borrower is not serving in a medical internship or residency program, except for a residency program in dentistry.

(2)(i) The borrower is seeking and unable to find full-time employment.

(ii) For purposes of paragraph (b)(2)(i) of this section, the Secretary determines whether a borrower is eligible for a deferment due to the inability to find full-time employment using the standards and procedures set forth in 34 CFR 682.210(h) with references to the lender understood to mean the Secretary.

(3)(i) The borrower has experienced or will experience an economic hardship.

(ii) For purposes of paragraph (b)(3)(i) of this section, the Secretary determines whether a borrower is eligible for a deferment due to an economic hardship using the standards and procedures set forth in 34 CFR 682.210(s)(6) with references to the lender understood to mean the Secretary.

(c) No deferment under paragraphs (b)(2) or (3) of this section may exceed three years.

(d) If, at the time of consolidation, a Direct Consolidation Loan borrower has an outstanding balance on an FFEL Program loan that was made prior to July 1, 1993, the borrower is eligible for a deferment during—

(1) The periods described in paragraph (b) of this section; and

(2) The periods described in 34 CFR 682.210(b), including those periods that apply to a "new borrower" as that term is defined in 34 CFR 682.210(b)(7).

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.205 Forbearance.

(a) *General.* "Forbearance" means permitting the temporary cessation of payments, allowing an extension of time for making payments, or temporarily accepting smaller payments than previously scheduled. The borrower has the option to choose the form of forbearance. If payments of interest are forborne, they are capitalized. The Secretary grants forbearance if the borrower or endorser intends to repay the loan but requests forbearance and provides sufficient documentation to support this request, and—

(1) The Secretary determines that, due to poor health or other acceptable reasons, the borrower or endorser is currently unable to make scheduled payments;

(2) The borrower's payments of principal are deferred under § 685.204 and the Secretary does not subsidize the interest benefits on behalf of the borrower.

(3) The borrower is in a medical or dental internship or residency that must be successfully completed before the borrower may begin professional practice or service, or the borrower is serving in a medical or dental internship or residency program leading to a degree or certificate awarded by an institution of higher education, a hospital, or a health care facility that offers postgraduate training;

(4) The borrower is serving in a national service position for which the borrower or endorser is receiving a national service educational award under the National and Community Service Trust Act of 1993; or

(5) For not more than three years, the borrower or endorser—

(i) Is currently obligated to make payments on loans under title IV of the Act; and

(ii) The sum of these payments each month (or a proportional share if the payments are due less frequently than monthly) is equal to or greater than 20 percent of the borrower or endorser's total monthly gross income.

(b) *Administrative forbearance.* In certain circumstances, the Secretary grants forbearance without requiring documentation from the borrower. These circumstances include but are not limited to—

(1) A properly granted period of deferment for which the Secretary learns the borrower did not qualify;

(2) The period for which payments are overdue at the beginning of an authorized deferment period;

(3) The period beginning when the borrower entered repayment until the first payment due date was established;

(4) The period prior to a borrower's filing of a bankruptcy petition;

(5) A period after the Secretary receives reliable information indicating that the borrower (or the student in the case of a Direct PLUS Loan) has died, or the borrower has become totally and permanently disabled, until the Secretary receives documentation of death or total and permanent disability;

(6) Periods necessary for the Secretary to determine the borrower's eligibility for discharge—

(i) Under § 685.213;

(ii) Under § 685.214; or

(iii) Due to the borrower's or endorser's (if applicable) bankruptcy;

(7) A period of up to three years in cases where the effect of a variable interest rate on a fixed-amount or graduated repayment schedule causes

the extension of the maximum repayment term; or

(8) A period in the event of a national military mobilization or other local or national emergency.

(c) *Period of forbearance.* (1) The Secretary grants forbearance for a period of up to one year.

(2) The forbearance is renewable, upon request of the borrower, for the duration of the period in which the borrower meets the condition required for the forbearance.

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.206 Borrower responsibilities and defenses.

(a) The borrower shall give the school the following information as part of the origination process for a Direct Subsidized, Direct Unsubsidized, or Direct PLUS Loan:

(1) A statement, as described in 34 CFR Part 668, that the loan will be used for the cost of the student's attendance.

(2) Information demonstrating that the borrower is eligible for the loan.

(3) Information concerning the outstanding FFEL Program and Direct Loan Program loans of the borrower and, for a parent borrower, of the student, including any Federal Consolidation Loan or Direct Consolidation Loan.

(4) A statement authorizing the school to release to the Secretary information relevant to the student's eligibility to borrow or to have a parent borrow on the student's behalf (e.g., the student's enrollment status, financial assistance, and employment records).

(b)(1) The borrower shall promptly notify the Secretary of any change of name, address, student status to less than half-time, employer, or employer's address; and

(2) The borrower shall promptly notify the school of any change in address during enrollment.

(c) *Borrower defenses.* (1) In any proceeding to collect on a Direct Loan, the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law. These proceedings include, but are not limited to, the following:

(i) Tax refund offset proceedings under 34 CFR 30.33.

(ii) Wage garnishment proceedings under section 488A of the Act.

(iii) Salary offset proceedings for Federal employees under 34 CFR Part 31.

(iv) Credit bureau reporting proceedings under 31 U.S.C. 3711(f).

(2) If the borrower's defense against repayment is successful, the Secretary

notifies the borrower that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief may include, but is not limited to, the following:

(i) Reimbursing the borrower for amounts paid toward the loan voluntarily or through enforced collection.

(ii) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act.

(iii) Updating reports to credit bureaus to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan.

(3) The Secretary may initiate an appropriate proceeding to require the school whose act or omission resulted in the borrower's successful defense against repayment of a Direct Loan to pay to the Secretary the amount of the loan to which the defense applies. However, the Secretary does not initiate such a proceeding after the period for the retention of records described in § 685.308(c) unless the school received actual notice of the claim during that period.

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.207 Obligation to repay.

(a) *Obligation of repayment in general.* (1) A borrower is obligated to repay the full amount of a Direct Loan, including the principal balance, fees, any collection costs charged under § 685.202(e), and any interest not subsidized by the Secretary, unless the borrower is relieved of the obligation to repay as provided in this part.

(2) The borrower's repayment of a Direct Loan may also be subject to the deferment provisions in § 685.204, the forbearance provisions in § 685.205, and the discharge provisions in § 685.212.

(b) *Direct Subsidized Loan repayment.* (1) During the period in which a borrower is enrolled at an eligible school on at least a half-time basis, the borrower is in an "in-school" period and is not required to make payments on a Direct Subsidized Loan unless—

(i) The loan entered repayment before the in-school period began; and

(ii) The borrower has not been granted a deferment under § 685.204.

(2)(i) When a borrower ceases to be enrolled at an eligible school on at least a half-time basis, a six-month grace

period begins, unless the grace period has been previously exhausted.

(ii) During a grace period, the borrower is not required to make payments on a Direct Subsidized Loan.

(3) A borrower is not obligated to pay interest on a Direct Subsidized Loan for in-school or grace periods unless the borrower is required to make payments on the loan during those periods under paragraph (b)(1) of this section.

(4) The repayment period for a Direct Subsidized Loan begins the day after the grace period ends. A borrower is obligated to repay the loan under paragraph (a) of this section during the repayment period.

(c) *Direct Unsubsidized Loan repayment.* (1) During the period in which a borrower is enrolled at an eligible school on at least a half-time basis, the borrower is in an "in-school" period and is not required to make payments of principal on a Direct Unsubsidized Loan unless—

(i) The loan entered repayment before the in-school period began; and

(ii) The borrower has not been granted a deferment under § 685.204.

(2)(i) When a borrower ceases to be enrolled at an eligible school on at least a half-time basis, a six-month grace period begins, unless the grace period has been previously exhausted.

(ii) During a grace period, the borrower is not required to make any principal payments on a Direct Unsubsidized Loan.

(3) A borrower is responsible for the interest that accrues on a Direct Unsubsidized Loan during in-school and grace periods. Interest that accrues may be capitalized or paid by the borrower.

(4) The repayment period for a Direct Unsubsidized Loan begins the day after the grace period ends. A borrower is obligated to repay the loan under paragraph (a) of this section during the repayment period.

(d) *Direct PLUS Loan repayment.* The repayment period for a Direct PLUS Loan begins on the day the loan is fully disbursed. Interest begins to accrue on the day the first installment is disbursed. A borrower is obligated to repay the loan under paragraph (a) of this section during the repayment period.

(e) *Direct Consolidation Loan repayment.* The repayment period for a Direct Consolidation Loan begins and interest begins to accrue on the day the loan is disbursed. The borrower is obligated to repay the loan under paragraph (a) of this section during the repayment period.

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.208 Repayment plans.

(a) *General.* (1) A borrower may repay a Direct Subsidized Loan, a Direct Unsubsidized Loan, a Direct Subsidized Consolidation Loan, or a Direct Unsubsidized Consolidation Loan under the standard repayment plan, the extended repayment plan, the graduated repayment plan, or the income contingent repayment plan.

(2) A borrower may repay a Direct PLUS Loan or a Direct PLUS Consolidation Loan under the standard repayment plan, the extended repayment plan, or the graduated repayment plan.

(3) The Secretary may provide an alternative repayment plan in accordance with paragraph (g) of this section.

(4) All Direct Loans obtained by one borrower must be repaid together under the same repayment plan, except that a borrower of a Direct PLUS Loan or a Direct PLUS Consolidation Loan may repay the Direct PLUS Loan or the Direct PLUS Consolidation Loan separately from other Direct Loans obtained by that borrower.

(b) *Standard repayment plan.* (1) Under the standard repayment plan, a borrower shall repay a loan in full within ten years from the date the loan entered repayment by making fixed monthly payments.

(2) Periods of authorized deferment or forbearance are not included in the ten-year repayment period.

(3) A borrower's payments under the standard repayment plan are at least \$50 per month, except that a borrower's final payment may be less than \$50.

(4) The number of payments or the fixed monthly repayment amount may be adjusted to reflect changes in the variable interest rate identified in § 685.202(a).

(c) *Extended repayment plan.* (1) Under the extended repayment plan, a borrower shall repay a loan in full by making fixed monthly payments within an extended period of time that varies with the total amount of the borrower's loans, as described in paragraph (e) of this section.

(2) Periods of deferment and forbearance are not included in the number of years of repayment.

(3) A borrower makes fixed monthly payments of at least \$50, except that a borrower's final payment may be less than \$50.

(4) The number of payments or the fixed monthly repayment amount may be adjusted to reflect changes in the variable interest rate identified in § 685.202(a).

(d) *Graduated repayment plan.* (1) Under the graduated repayment plan, a

borrower shall repay a loan in full by making payments at two or more levels within a period of time that varies with the total amount of the borrower's loans, as described in paragraph (e) of this section.

(2) Periods of deferment and forbearance are not included in the number of years of repayment.

(3) The number of payments or the monthly repayment amount may be adjusted to reflect changes in the variable interest rate identified in § 685.202(a).

(4) No scheduled payment under the graduated repayment plan may be less than the amount of interest accrued on the loan between monthly payments, less than 50% of the payment amount that would be required under the standard repayment plan, or more than 150% of the payment amount that would be required under the standard repayment plan.

(e) *Repayment period for the extended and graduated plans.* Under the extended and graduated repayment plans, if the total amount of the borrower's Direct Loans is—

(1) Less than \$10,000, the borrower shall repay the loans within 12 years of entering repayment;

(2) Greater than or equal to \$10,000 but less than \$20,000, the borrower shall repay the loans within 15 years of entering repayment;

(3) Greater than or equal to \$20,000 but less than \$40,000, the borrower shall repay the loans within 20 years of entering repayment;

(4) Greater than or equal to \$40,000 but less than \$60,000, the borrower shall repay the loans within 25 years of entering repayment; and

(5) Greater than or equal to \$60,000, the borrower shall repay the loans within 30 years of entering repayment.

(f) *Income contingent repayment plan.*

(1) Under the income contingent repayment plan, a borrower's monthly repayment amount is generally based on the total amount of the borrower's (and, in some circumstances, the borrower's spouse's) Direct Loans, family size, and Adjusted Gross Income (AGI) reported by the borrower for the most recent year for which the Secretary has obtained income information. In the case of a married borrower who files a joint Federal income tax return and is not repaying loans jointly with a spouse under § 685.209(a)(4), the borrower's AGI includes the income of the borrower's spouse. A borrower shall make payments on a loan until the loan is repaid in full or until the loan has been in repayment through the end of the income contingent repayment period.

(2) The regulations in effect at the time a borrower's first Direct Loan enters repayment govern the method for determining the borrower's monthly repayment amount for all of the borrower's Direct Loans, unless—

(i) The Secretary amends the regulations relating to a borrower's monthly repayment amount under the income contingent repayment plan; and

(ii) The borrower submits a written request that the amended regulations apply to the repayment of the borrower's Direct Loans.

(3) Provisions governing the income contingent repayment plan are set out in § 685.209.

(g) *Alternative repayment.* (1) The Secretary may provide an alternative repayment plan for a borrower who demonstrates to the Secretary's satisfaction that the terms and conditions of the repayment plans specified in paragraphs (b) through (f) of this section are not adequate to accommodate the borrower's exceptional circumstances.

(2) The Secretary may require a borrower to provide evidence of the borrower's exceptional circumstances before permitting the borrower to repay a loan under an alternative repayment plan.

(3) If the Secretary agrees to permit a borrower to repay a loan under an alternative repayment plan, the Secretary notifies the borrower in writing of the terms of the plan. After the borrower receives notification of the terms of the plan, the borrower may accept the plan or choose another repayment plan.

(4) If a borrower's payment under the alternative repayment plan is less than the accrued interest on the loan, the unpaid interest is added to the principal balance of the loan.

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.209 Income contingent repayment plan.

(a)(1) Under the income contingent repayment plan described in § 685.208(f), a borrower may choose to repay Direct Loans in one of two ways. The borrower's options are described in paragraphs (b) and (c) of this section.

(2) A borrower may change options under the income contingent repayment plan by notifying the Secretary in writing. However, a borrower may change options no more frequently than once a year. The Secretary annually provides the borrower with estimates of monthly payment amounts under each option.

(3) The Secretary may determine that special circumstances, such as a loss of employment by the borrower or the

borrower's spouse, warrant an adjustment to the borrower's repayment obligations.

(4) Married borrowers may repay their loans jointly if they meet the following requirements:

(i) Each spouse is repaying a Direct Loan under the same option of the income contingent repayment plan.

(ii) The spouses filed a joint Federal income tax return for the most recent year for which the Secretary has obtained income information.

(iii) The spouses submit a written request that includes their names and social security numbers to the Secretary.

(5) Examples of the calculation of the monthly repayment amounts under both options of the income contingent repayment plan and a table that shows monthly repayment amounts for borrowers at various income and debt levels under both options are included in Appendix A to this part.

(b) *Option 1.—(1) General.* (i) In general, under Option 1, a borrower shall make monthly payments calculated using a percentage of the borrower's Adjusted Gross Income (AGI) called the "payback rate." The payback rate is based upon the total amount of the borrower's Direct Loans, as described under paragraph (b)(2) of this section. The minimum payback rate is four percent, and the maximum rate is 15 percent.

(ii) If a borrower provides documentation acceptable to the Secretary that the borrower has one or more dependents other than the borrower's spouse, the Secretary subtracts from the borrower's monthly payment a family size adjustment of seven dollars per dependent for up to five dependents.

(iii) A borrower's monthly payment is equal to the borrower's AGI multiplied by the payback rate, divided by 12 months, minus the family size adjustment amount. However, if the monthly repayment amount is less than \$25, the borrower is not required to make a payment.

(2) *Payback rate.* (i) A borrower's payback rate is based upon the borrower's Direct Loan debt when the borrower's first loan enters repayment and does not change unless the borrower obtains another Direct Loan or the borrower and the borrower's spouse obtain approval to repay their loans jointly under paragraph (a)(4) of this section. If the borrower obtains another Direct Loan, a new payback rate for all of the borrower's Direct Loans is calculated on the basis of the combined amounts of the loans when the loans entered repayment.

(ii) If the total amount of a borrower's Direct Loans is less than or equal to \$1,000, the payback rate is four percent. If the total amount of a borrower's Direct Loans is greater than \$1,000, the payback rate is four percent plus an additional percent that begins at zero and increases at a rate of 0.2 percent for each additional \$1,000 borrowed up to a maximum payback rate of 15 percent.

(iii) More specifically, if the total amount of a borrower's Direct Loans is greater than \$1,000, the payback rate is the lesser of 0.15 or the following: $0.04 + (\text{debt} - 1,000) (0.000002)$.

(3) *Exception for certain married borrowers.* The combined monthly payment amount for married borrowers who repay their loans jointly under paragraph (a)(4) of this section is the total of the individual monthly payment amounts for each borrower calculated under paragraph (b)(1)(iii) of this section. The amount of a borrower's individual monthly payment amount is applied to that borrower's debt. The payback rate for each borrower is calculated separately on the basis of the amount of the borrower's Direct Loans. For purposes of this paragraph, the Secretary assumes that the AGI for each borrower is proportionate to the relative size of the borrower's individual debt and subtracts one half of the applicable family size adjustment from each borrower's monthly payment amount. If the combined monthly repayment amount is less than \$25, the borrowers are not required to make a payment.

(c) *Option 2.* (1) In general, under Option 2, a borrower shall make monthly payments as calculated under Option 1, except that no monthly payment exceeds the amount the borrower would repay over 12 years using standard amortization. The Secretary calculates the 12-year standard amortization amount on the basis of the interest rate in effect when the borrower chooses Option 2. The amount a borrower would repay over 12 years using standard amortization is determined without any family size adjustment or minimum monthly repayment amount.

(2) More specifically, if a borrower chooses Option 2 under the income contingent repayment plan—

(i) The borrower's payments do not exceed the 12-year standard amortization amount regardless of the borrower's income;

(ii) The borrower's repayment period may be extended beyond the repayment period under Option 1 (but not beyond the 25-year maximum period described in § 685.209(d)(2)(i)); and

(iii) Interest accrues throughout the repayment period and is capitalized

until the limitation on capitalization of interest in paragraph (d)(3) of this section is reached.

(3) *Exception for certain married borrowers.* The combined monthly payment amount for married borrowers who repay their loans jointly under paragraph (a)(4) of this section is the total of the individual monthly payment amounts for each borrower calculated under paragraph (b)(1)(iii) of this section, unless the combined amount exceeds the 12-year standard amortization amount. If the combined amount exceeds the 12-year standard amortization amount, the couple pays the 12-year standard amortization amount, and the amount applied to each borrower's debt is determined by calculating the 12-year standard amortization amount for that borrower's debt.

(d) *Other features of the income contingent repayment plan.* (1) *Alternative documentation of income.* If a borrower's AGI is not available or if, in the Secretary's opinion, the borrower's reported AGI does not reasonably reflect the borrower's current income, the Secretary may use other documentation of income provided by the borrower to calculate the borrower's monthly repayment amount.

(2) *Repayment period.* (i) The maximum repayment period under the income contingent repayment plan is 25 years.

(ii) The repayment period does not include periods in which the borrower makes payments under the standard, extended, graduated, or alternative repayment plan or periods of authorized deferment or forbearance.

(iii) If a borrower repays more than one loan under the income contingent repayment plan, a separate repayment period for each loan begins when that loan enters repayment.

(iv) If a borrower has not repaid a loan in full at the end of the 25-year repayment period under the income contingent repayment plan, the Secretary cancels the unpaid portion of the loan.

(v) At the beginning of the repayment period, a borrower shall make monthly payments of the amount of interest that accrues on the borrower's Direct Loans until the Secretary calculates the borrower's monthly repayment amount on the basis of the borrower's income.

(3) *Limitation on capitalization of interest.* If the amount of a borrower's monthly payment is less than the accrued interest, the unpaid interest is capitalized until the outstanding principal amount increases to one and one-half times the original principal amount. After the outstanding principal

amount reaches one and one-half times the original amount, interest continues to accrue but is not capitalized. For purposes of this paragraph, the original amount is the amount owed by the borrower when the borrower enters repayment.

(4) *Notification of terms and conditions.* When a borrower selects or is required by the Secretary to repay a loan under the income contingent repayment plan, the Secretary notifies the borrower of the terms and conditions of the plan, including—

(i) That the Internal Revenue Service will disclose certain tax return information to the Secretary or the Secretary's agents; and

(ii) That if the borrower believes that special circumstances warrant an adjustment to the borrower's repayment obligations, as described in § 685.209(a)(3), the borrower may contact the Secretary and obtain the Secretary's determination as to whether an adjustment is appropriate.

(5) *Consent to disclosure of tax return information.* (i) A borrower shall provide written consent to the disclosure of certain tax return information by the Internal Revenue Service (IRS) to agents of the Secretary for purposes of calculating a monthly repayment amount and servicing and collecting a loan under the income contingent repayment plan. The borrower shall provide consent by signing a consent form, developed consistent with 26 CFR 301.6103(c)-1 and provided to the borrower by the Secretary, and shall return the signed form to the Secretary.

(ii) The borrower shall consent to disclosure of the borrower's taxpayer identity information as defined in 26 U.S.C. 6103(b)(6), tax filing status, and AGI.

(iii) The borrower shall provide consent for a period of five years from the date the borrower signs the consent form. The Secretary provides the borrower a new consent form before that period expires. The IRS does not disclose tax return information after the IRS has processed a borrower's withdrawal of consent.

(iv) The Secretary designates the standard repayment plan for a borrower who selects the income contingent repayment plan but—

(A) Fails to provide the required written consent;

(B) Fails to renew written consent upon the expiration of the five-year period for consent; or

(C) Withdraws consent and does not select another repayment plan.

(v) If a borrower defaults and the Secretary designates the income

contingent repayment plan for the borrower but the borrower fails to provide the required written consent, the Secretary consults with the borrower prior to establishing a repayment plan for the borrower.

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.210 Choice of repayment plan.

(a) *Initial selection of a repayment plan.* (1) Before a Direct Loan enters into repayment, the Secretary provides the borrower a description of the available repayment plans and requests the borrower to select one. A borrower may select a repayment plan before the loan enters repayment by notifying the Secretary of the borrower's selection in writing.

(2) If a borrower does not select a repayment plan within 45 days after the Secretary provides the borrower with a description of available repayment plans, the Secretary designates the standard repayment plan described in § 685.208(b) for the borrower.

(b) *Changing repayment plans.* (1) A borrower may change repayment plans at any time after the loan has entered repayment by notifying the Secretary in writing. However, a borrower who is repaying a defaulted loan under the income contingent repayment plan under § 685.211(c)(3)(ii) may not change to another repayment plan unless—

(i) The borrower was required to and did make a payment under the income contingent repayment plan in each of the prior six months; and

(ii) The borrower makes and the Secretary approves a request to change plans.

(2)(i) A borrower may not change to a repayment plan that has a maximum repayment period of less than the number of years the loan has already been in repayment, except that a borrower may change to the income contingent repayment plan at any time.

(ii) If a borrower changes plans, the repayment period is the period provided for under the borrower's new repayment plan, calculated from the date the loan initially entered repayment. However, if a borrower changes to the income contingent repayment plan, the repayment period is calculated as described in § 685.209(d)(2).

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.211 Miscellaneous repayment provisions.

(a) *Payment application and prepayment.* (1) The Secretary applies any payment first to any accrued charges and collection costs, then to any outstanding interest, and then to outstanding principal.

(2) A borrower may prepay all or part of a loan at any time without penalty. If a borrower pays any amount in excess of the amount due, the excess amount is a prepayment.

(3) If a prepayment equals or exceeds the monthly repayment amount under the borrower's repayment plan, the Secretary—

(i) Applies the prepaid amount according to paragraph (a)(1) of this section;

(ii) Advances the due date of the next payment unless the borrower requests otherwise; and

(iii) Notifies the borrower of any revised due date for the next payment.

(4) If a prepayment is less than the monthly repayment amount, the Secretary applies the prepayment according to paragraph (a)(1) of this section.

(b) *Refunds from schools.* The Secretary applies any refund due to a borrower that the Secretary receives from a school under § 668.22 against the borrower's outstanding principal and notifies the borrower of the refund.

(c) *Default—(1) Acceleration.* If a borrower defaults on a Direct Loan, the entire unpaid balance and accrued interest are immediately due and payable.

(2) *Collection charges.* If a borrower defaults on a Direct Loan, the Secretary assesses collection charges in accordance with § 685.202(e).

(3) *Collection of a defaulted loan.* (i) The Secretary may take any action authorized by law to collect a defaulted Direct Loan including, but not limited to, filing a lawsuit against the borrower, reporting the default to national credit bureaus, requesting the Internal Revenue Service to offset the borrower's Federal income tax refund, and garnishing the borrower's wages.

(ii) If a borrower defaults on a Direct Stafford Loan, a Direct Unsubsidized Stafford Loan, a Direct Unsubsidized Consolidation Loan or a Direct Subsidized Consolidation Loan, the Secretary may designate the income contingent repayment plan for the borrower.

(d) *Ineligible borrowers.* (1) The Secretary determines that a borrower is ineligible if, at the time the loan was made and without the school's or the Secretary's knowledge, the borrower (or the student on whose behalf a parent borrowed) provided false or erroneous information or took actions that caused the borrower or student—

(i) To receive a loan for which the borrower is wholly or partially ineligible;

(ii) To receive interest benefits for which the borrower was ineligible; or

(iii) To receive loan proceeds for a period of enrollment for which the borrower was not eligible.

(2) If the Secretary makes the determination described in paragraph (d)(1) of this section, the Secretary sends an ineligible borrower a demand letter that requires the borrower to repay some or all of a loan, as appropriate. The demand letter requires that within 30 days of the borrower's receipt of the letter, the borrower repay any principal amount for which the borrower is ineligible and any accrued interest, including interest subsidized by the Secretary, through the previous quarter.

(3) If a borrower fails to comply with the demand letter described in paragraph (d)(2) of this section, the borrower is in default.

(4) A borrower may not consolidate a loan under § 685.215 for which the borrower is wholly or partially ineligible.

(e) *Rehabilitation of defaulted loans.* A defaulted Direct Loan is rehabilitated if the borrower makes 12 consecutive on-time, reasonable, and affordable monthly payments. The amount of such a payment is determined on the basis of the borrower's total financial circumstances. If a defaulted loan is rehabilitated, the Secretary instructs any credit bureau to which the default was reported to remove the default from the borrower's credit history.

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.212 Discharge of a loan obligation.

(a) *Death.* If the Secretary receives acceptable documentation that a borrower (or the student on whose behalf a parent borrowed) has died, the Secretary discharges the obligation of the borrower and any endorser to make any further payments on the loan.

(b) *Total and permanent disability.* If the Secretary receives acceptable documentation that a borrower has become totally and permanently disabled, the Secretary discharges the obligation of the borrower and any endorser to make any further payments on the loan. A borrower is not considered totally and permanently disabled based on a condition that existed at the time the borrower applied for the loan unless the borrower's condition substantially deteriorated after the loan was made so as to render the borrower totally and permanently disabled.

(c) *Bankruptcy.* If a borrower's obligation to repay a loan is discharged in bankruptcy, the Secretary does not require the borrower or any endorser to make any further payments on the loan.

(d) *Closed schools.* If a borrower meets the requirements in § 685.213, the

Secretary discharges the obligation of the borrower and any endorser to make any further payments on the loan.

(e) *False certification and unauthorized disbursement.* If a borrower meets the requirements in § 685.214, the Secretary discharges the obligation of the borrower and any endorser to make any further payments on the loan.

(f) *Payments received after eligibility for discharge.* The Secretary returns to the sender or, for a discharge based on death, the borrower's estate, those payments received after the requirements for discharge have been met.

(g) *Loan forgiveness demonstration program.* If funds are appropriated for the loan forgiveness demonstration program authorized by section 428J of the Act, the Secretary follows the procedures and applies the standards in 34 CFR 682.215 for borrowers under the Direct Loan Program.

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.213 Closed school discharge.

(a) *General.* (1) The Secretary discharges the borrower's (and any endorser's) obligation to repay a Direct Loan in accordance with the provisions of this section if the borrower (or the student on whose behalf a parent borrowed) did not complete the program of study for which the loan was made because the school at which the borrower (or student) was enrolled closed, as described in paragraph (c) of this section.

(2) For purposes of this section—

(i) A school's closure date is the date that the school ceases to provide educational instruction in all programs, as determined by the Secretary; and

(ii) "School" means a school's main campus or any location or branch of the main campus.

(b) *Relief pursuant to discharge.* (1) Discharge under this section relieves the borrower of any past or present obligation to repay the loan and any accrued charges or collection costs with respect to the loan.

(2) The discharge of a loan under this section qualifies the borrower for reimbursement of amounts paid voluntarily or through enforced collection on the loan.

(3) The Secretary does not regard a borrower who has defaulted on a loan discharged under this section as in default on the loan after discharge, and such a borrower is eligible to receive assistance under programs authorized by title IV of the Act.

(4) The Secretary reports the discharge of a loan under this section to all credit reporting agencies to which

the Secretary previously reported the status of the loan.

(c) *Borrower qualification for discharge.* In order to qualify for discharge of a loan under this section, a borrower shall submit to the Secretary a written request and sworn statement, and the factual assertions in the statement must be true. The statement need not be notarized but must be made by the borrower under penalty of perjury. In the statement, the borrower shall—

(1) State that the borrower (or the student on whose behalf a parent borrowed)—

(i) Received the proceeds of a loan to attend a school;

(ii) Did not complete the program of study at that school because the school closed while the student was enrolled, or the student withdrew from the school not more than 90 days before the school closed (or longer in exceptional circumstances); and

(iii) Did not complete the program of study through a teach-out at another school or by transferring academic credits or hours earned at the closed school to another school;

(2) State whether the borrower (or student) has made a claim with respect to the school's closing with any third party, such as the holder of a performance bond or a tuition recovery program, and, if so, the amount of any payment received by the borrower (or student) or credited to the borrower's loan obligation; and

(3) State that the borrower (or student)—

(i) Agrees to provide to the Secretary upon request other documentation reasonably available to the borrower that demonstrates that the borrower meets the qualifications for discharge under this section; and

(ii) Agrees to cooperate with the Secretary in enforcement actions in accordance with paragraph (d) of this section and to transfer any right to recovery against a third party to the Secretary in accordance with paragraph (e) of this section.

(d) *Cooperation by borrower in enforcement actions.* (1) In order to obtain a discharge under this section, a borrower shall cooperate with the Secretary in any judicial or administrative proceeding brought by the Secretary to recover for amounts discharged or to take other enforcement action with respect to the conduct on which the discharge was based. At the request of the Secretary and upon the Secretary's tendering to the borrower the fees and costs that are customarily provided in litigation to reimburse witnesses, the borrower shall—

(i) Provide testimony regarding any representation made by the borrower to support a request for discharge;

(ii) Produce any documents reasonably available to the borrower with respect to those representations; and

(iii) If required by the Secretary, provide a sworn statement regarding those documents and representations.

(2) The Secretary denies the request for a discharge or revokes the discharge of a borrower who—

(i) Fails to provide the testimony, documents, or a sworn statement required under paragraph (d)(1) of this section; or

(ii) Provides testimony, documents, or a sworn statement that does not support the material representations made by the borrower to obtain the discharge.

(e) *Transfer to the Secretary of borrower's right of recovery against third parties.* (1) Upon discharge under this section, the borrower is deemed to have assigned to and relinquished in favor of the Secretary any right to a loan refund (up to the amount discharged) that the borrower (or student) may have by contract or applicable law with respect to the loan or the enrollment agreement for the program for which the loan was received, against the school, its principals, its affiliates and their successors, its sureties, and any private fund, including the portion of a public fund that represents funds received from a private party.

(2) The provisions of this section apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower (or student), limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(3) Nothing in this section limits or forecloses the borrower's (or student's) right to pursue legal and equitable relief regarding disputes arising from matters unrelated to the discharged Direct Loan.

(f) *Discharge procedures.* (1) After confirming the date of a school's closure, the Secretary identifies any Direct Loan borrower (or student on whose behalf a parent borrowed) who appears to have been enrolled at the school on the school closure date or to have withdrawn not more than 90 days prior to the closure date.

(2) If the borrower's current address is known, the Secretary mails the borrower a discharge application and an explanation of the qualifications and procedures for obtaining a discharge. The Secretary also promptly suspends any efforts to collect from the borrower

on any affected loan. The Secretary may continue to receive borrower payments.

(3) If the borrower's current address is unknown, the Secretary attempts to locate the borrower and determines the borrower's potential eligibility for a discharge under this section by consulting with representatives of the closed school, the school's licensing agency, the school's accrediting agency, and other appropriate parties. If the Secretary learns the new address of a borrower, the Secretary mails to the borrower a discharge application and explanation and suspends collection, as described in paragraph (f)(2) of this section.

(4) If a borrower fails to submit the written request and sworn statement described in paragraph (c) of this section within 60 days of the Secretary's mailing the discharge application, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended. The Secretary may capitalize any interest accrued and not paid during that period.

(5) If the Secretary determines that a borrower who requests a discharge meets the qualifications for a discharge, the Secretary notifies the borrower in writing of that determination.

(6) If the Secretary determines that a borrower who requests a discharge does not meet the qualifications for a discharge, the Secretary notifies that borrower in writing of that determination and the reasons for the determination.

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.214 Discharge for false certification of student eligibility or unauthorized payment.

(a) *Basis for discharge*—(1) *False certification.* The Secretary discharges a borrower's (and any endorser's) obligation to repay a Direct Loan in accordance with the provisions of this section if a school falsely certifies the eligibility of the borrower (or the student on whose behalf a parent borrowed) to receive the loan. The Secretary considers a student's eligibility to borrow to have been falsely certified by the school if the school—

(i) Certified the student's eligibility for a Direct Loan on the basis of ability to benefit from its training and the student did not meet the eligibility requirements described in 34 CFR part 668 and section 484(d) of the Act, as applicable;

(ii) Signed the borrower's name on the loan application or promissory note without the borrower's authorization; or

(iii) Certified the eligibility of a student who, because of a physical or

mental condition, age, criminal record, or other reason accepted by the Secretary, would not meet the requirements for employment (in the student's State of residence when the loan was certified) in the occupation for which the training program supported by the loan was intended.

(2) *Unauthorized payment.* The Secretary discharges a borrower's (and any endorser's) obligation to repay a Direct Loan if the school, without the borrower's authorization, endorsed the borrower's loan check or signed the borrower's authorization for electronic funds transfer, unless the proceeds of the loan were delivered to the student or applied to charges owed by the student to the school.

(b) *Relief pursuant to discharge.* (1) Discharge for false certification under paragraph (a)(1) of this section relieves the borrower of any past or present obligation to repay the loan and any accrued charges and collection costs with respect to the loan.

(2) Discharge for unauthorized payment under paragraph (a)(2) of this section relieves the borrower of the obligation to repay the amount of the payment discharged.

(3) The discharge under this section qualifies the borrower for reimbursement of amounts paid voluntarily or through enforced collection on the discharged loan or payment.

(4) The Secretary does not regard a borrower who has defaulted on a loan discharged under this section as in default on the loan after discharge, and such a borrower is eligible to receive assistance under programs authorized by title IV of the Act.

(5) The Secretary reports the discharge under this section to all credit reporting agencies to which the Secretary previously reported the status of the loan.

(c) *Borrower qualification for discharge.* In order to qualify for discharge under this section, the borrower shall submit to the Secretary a written request and a sworn statement, and the factual assertions in the statement must be true. The statement need not be notarized but must be made by the borrower under penalty of perjury. In the statement, the borrower shall meet the requirements in paragraphs (c) (1) through (5) of this section.

(1) *Ability to benefit.* In the case of a borrower requesting a discharge based on the school's defective testing of the student's ability to benefit, the borrower shall state that the borrower (or the student on whose behalf a parent borrowed)—

(i) Received a disbursement of a loan to attend a school;

(ii) Received a Direct Loan at that school on the basis of an ability to benefit from the school's training and did not meet the eligibility requirements described in 34 CFR Part 668 and section 484(d) of the Act, as applicable; and

(iii) Either—

(A) Withdrew from the school and did not find employment in the occupation for which the training program was intended; or

(B) Completed the training program for which the loan was made, attempted to obtain employment in the occupation for which the program was intended, and was not able to find employment in that occupation or obtained employment in that occupation only after receiving additional training that was not provided by the school that certified the loan.

(2) *Unauthorized loan.* In the case of a borrower requesting a discharge because the school signed the borrower's name on the loan application or promissory note without the borrower's authorization, the borrower shall—

(i) State that he or she did not sign the document in question or authorize the school to do so; and

(ii) Provide five different specimens of his or her signature, two of which must be within one year before or after the date of the contested signature.

(3) *Unauthorized payment.* In the case of a borrower requesting a discharge because the school, without the borrower's authorization, endorsed the borrower's loan check or signed the borrower's authorization for electronic funds transfer, the borrower shall—

(i) State that he or she did not endorse the loan check or sign the authorization for electronic funds transfer or authorize the school to do so;

(ii) Provide five different specimens of his or her signature, two of which must be within one year before or after the date of the contested signature;

(iii) State that the proceeds of the contested disbursement were not delivered to the student or applied to charges owed by the student to the school.

(4) *Claim to third party.* The borrower shall state whether the borrower (or student) has made a claim with respect to the school's false certification or unauthorized payment with any third party, such as the holder of a performance bond or a tuition recovery program, and, if so, the amount of any payment received by the borrower (or student) or credited to the borrower's loan obligation.

(5) *Cooperation with Secretary.* The borrower shall state that the borrower (or student)—

(i) Agrees to provide to the Secretary upon request other documentation reasonably available to the borrower that demonstrates that the borrower meets the qualifications for discharge under this section; and

(ii) Agrees to cooperate with the Secretary in enforcement actions as described in § 685.213(d) and to transfer any right to recovery against a third party to the Secretary as described in § 685.213(e).

(d) *Discharge procedures.* (1) If the Secretary determines that a borrower's Direct Loan may be eligible for a discharge under this section, the Secretary mails the borrower a disclosure application and an explanation of the qualifications and procedures for obtaining a discharge. The Secretary also promptly suspends any efforts to collect from the borrower on any affected loan. The Secretary may continue to receive borrower payments.

(2) If the borrower fails to submit the written request and sworn statement described in paragraph (c) of this section within 60 days of the Secretary's mailing the disclosure application, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended. The Secretary may capitalize any interest accrued and not paid during that period.

(3) If the borrower submits the written request and sworn statement described in paragraph (c) of the section, the Secretary determines whether to grant a request for discharge under this section by reviewing the request and sworn statement in light of information available from the Secretary's records and from other sources, including guaranty agencies, State authorities, and cognizant accrediting associations.

(4) If the Secretary determines that the borrower meets the applicable requirements for a discharge under paragraph (c) of this section, the Secretary notifies the borrower in writing of that determination.

(5) If the Secretary determines that the borrower does not qualify for a discharge, the Secretary notifies the borrower in writing of that determination and the reasons for the determination.

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.215 Consolidation.

(a) *Direct Consolidation Loans.* A borrower may consolidate one or more education loans made under certain Federal programs into one or more Direct Consolidation Loans. Loans

consolidated into a Direct Consolidation Loan are discharged when the Direct Consolidation Loan is originated.

(b) *Loans eligible for consolidation.* The following loans may be consolidated into a Direct Consolidation Loan:

- (1) Federal Stafford Loans.
- (2) Guaranteed Student Loans.
- (3) Federal Insured Student Loans (FISL).
- (4) Direct Subsidized Loans.
- (5) Direct Subsidized Consolidation Loans.
- (6) Federal Perkins Loans.
- (7) National Direct Student Loans (NDSL).
- (8) National Defense Student Loans (NDSL).
- (9) Federal PLUS Loans.
- (10) Parent Loans for Undergraduate Students (PLUS).
- (11) Direct PLUS Loans.
- (12) Direct PLUS Consolidation Loans.
- (13) Federal Unsubsidized Stafford Loans.
- (14) Federal Supplemental Loans for Students (SLS).
- (15) Federal Consolidation Loans.
- (16) Direct Unsubsidized Loans.
- (17) Direct Unsubsidized Consolidation Loans.
- (18) Auxiliary Loans to Assist Students (ALAS).
- (19) Health Professions Student Loans (HPSL).
- (20) Health Education Assistance Loans (HEAL).
- (21) Other loans made under subpart II of part A of title VII of the Public Health Service Act.

(c) *Types of Direct Consolidation Loans.* (1) The loans identified in paragraphs (b)(1) through (8) of this section may be consolidated into a Direct Subsidized Consolidation Loan.

(2) The loans identified in paragraphs (b)(9) through (12) of this section may be consolidated into a Direct PLUS Consolidation Loan.

(3) The loans identified in paragraphs (b)(13) through (21) of this section may be consolidated into a Direct Unsubsidized Consolidation Loan.

(d) *Eligibility for a Direct Consolidation Loan.* (1) A borrower may obtain a Direct Consolidation Loan if, at the time the borrower applies for such a loan, the borrower meets the following requirements:

- (i) The borrower either—
 - (A) Has an outstanding balance on a Direct Loan; or
 - (B) Has an outstanding balance on an FFEL loan and asserts either—
 - (1) That the borrower is unable to obtain an FFEL consolidation loan; or
 - (2) That the borrower is unable to obtain an FFEL consolidation loan with

income-sensitive repayment terms acceptable to the borrower and is eligible for the income contingent repayment plan under the Direct Loan Program.

(ii) On the loans being consolidated, the borrower is—

(A) In an in-school period and seeks to consolidate loans made under both the FFEL Program and the Direct Loan Program;

(B) In a six-month grace period;

(C) In a repayment period but not in default;

(D) In default but has made satisfactory arrangements to repay the defaulted loan; or

(E) In default but agrees to repay the consolidation loan under the income contingent repayment plan described in § 685.208(f) and signs the consent form described in § 685.209(d)(5).

(iii) The borrower certifies that no other application to consolidate any of the borrower's loans listed in paragraph (b) of this section is pending with any other lender.

(iv) The borrower agrees to notify the Secretary of any change in address.

(v) In the case of a Direct PLUS Consolidation Loan—

(A) The borrower may not have an adverse credit history as defined in § 685.200(b)(7)(ii); or

(B) If the borrower has such an adverse credit history, the borrower shall obtain an endorser for the consolidation loan who does not have an adverse credit history or provide documentation satisfactory to the Secretary that extenuating circumstances relating to the borrower's credit history exist.

(2) Two married borrowers may consolidate their loans together if they meet the following requirements:

(i) At least one spouse meets the requirements of paragraph (d)(1)(i) of this section.

(ii) Both spouses meet the requirements of paragraphs (d)(1)(ii) through (v) of this section.

(iii) Each spouse agrees to be held jointly and severally liable for the repayment of the total amount of the consolidation loan and to repay the loan regardless of any change in marital status.

(e) *Application for a Direct Consolidation Loan.* To obtain a Direct Consolidation Loan, a borrower or borrowers shall submit a completed application to the Secretary. A single application may be used for one or more consolidation loans. A borrower may add eligible loans to a Direct Consolidation Loan by submitting a request to the Secretary within 180 days after the date on which the Direct Consolidation Loan is originated.

(f) *Origination of a consolidation loan.* (1) If the Secretary approves an application for a consolidation loan, the Secretary pays to each holder of a loan selected for consolidation the amount necessary to discharge the loan. For a loan that is in default, the Secretary limits collection costs that may be charged to the borrower to no more than those authorized under the FFEL Program and may impose reasonable limits on collection costs paid to the holder.

(2) Upon receipt of the proceeds of a Direct Consolidation Loan, the holder of a consolidated loan shall promptly apply the proceeds to fully discharge the borrower's obligation on the consolidated loan. The holder of a consolidated loan shall notify the borrower that the loan has been paid in full.

(3) The principal balance of a Direct Consolidation Loan is equal to the sum of the amounts paid to the holders of the consolidated loans.

(4) If the amount paid by the Secretary to the holder of a consolidated loan exceeds the amount needed to discharge that loan, the holder of the consolidated loan shall promptly refund the excess amount to the Secretary to be credited against the outstanding balance of the Direct Consolidation Loan.

(5) If the amount paid by the Secretary to the holder of the consolidated loan is insufficient to discharge that loan, the holder shall notify the Secretary in writing of the remaining amount due on the loan. The Secretary promptly pays the remaining amount due.

(g) *Interest rate.* The interest rate on a Direct Subsidized Consolidation Loan or a Direct Unsubsidized Consolidation Loan is the rate established for Direct Subsidized Loans and Direct Unsubsidized Loans under § 685.202(a)(1). The interest rate on a Direct PLUS Consolidation Loan is the rate established for Direct PLUS Loans under § 685.202(a)(2).

(h) *Repayment plans.* A borrower may repay a Direct Consolidation Loan under any of the repayment plans described in § 685.208, except that—

(1) A borrower may not repay a Direct PLUS Consolidation Loan under the income contingent repayment plan; and

(2) A borrower who became eligible to consolidate a defaulted loan under paragraph (d)(1)(ii)(E) of this section shall repay the consolidation loan under the income contingent repayment plan unless—

(i) The borrower was required to and did make a payment under the income contingent repayment plan in each of the prior six months; and

(ii) The borrower makes and the Secretary approves a request to change plans.

(i) *Repayment period.* (1) Except as noted in paragraph (i)(4) of this section, the repayment period for a Direct Consolidation Loan begins on the day the loan is disbursed.

(2) Under the extended or graduated repayment plan, the Secretary determines the repayment period under § 685.208(e) on the basis of the outstanding balances on all of the borrower's loans that are eligible for consolidation and the balances on other education loans except as provided in paragraph (i)(3) of this section.

(3)(i) The total amount of outstanding balances on the other education loans used to determine the repayment period under the graduated or extended repayment plan may not exceed the amount of the Direct Consolidation Loan.

(ii) The borrower may not be in default on the other education loan unless the borrower has made satisfactory repayment arrangements with the holder of the loan.

(iii) The lender of the other educational loan may not be an individual.

(4) A Direct Consolidation Loan receives a grace period if it includes a Direct Loan or FFEL Program loan for which the borrower is in an in-school period at the time of consolidation. The repayment period begins the day after the grace period ends.

(j) *Repayment schedule.* (1) The Secretary provides a borrower of a Direct Consolidation Loan a repayment schedule before the borrower's first payment is due. The repayment schedule identifies the borrower's monthly repayment amount under the repayment plan selected.

(2) If a borrower adds an eligible loan to the consolidation loan under paragraph (e) of this section, the Secretary makes appropriate adjustments to the borrower's monthly repayment amount and repayment period.

(k) *Refunds received from schools.* If a lender receives a refund from a school on a loan that has been consolidated into a Direct Consolidation Loan, the lender shall transmit the refund and an explanation of the source of the refund to the Secretary within 30 days of receipt.

(l) *Special provisions for joint consolidation loans.* The provisions of paragraphs (l) (1) through (3) of this section apply to a Direct Consolidation Loan obtained by two married borrowers.

(1) *Deferment.* To obtain a deferment on a joint Direct Consolidation Loan under § 685.204, both borrowers shall meet the requirements of that section.

(2) *Forbearance.* To obtain forbearance on a joint Direct Consolidation Loan under § 685.205, both borrowers shall meet the requirements of that section.

(3) *Discharge.* (i) To obtain a discharge of a joint Direct Consolidation Loan under § 685.212, each borrower shall meet the requirements for one of the types of discharge described in that section.

(ii) If a borrower meets the requirements for discharge under § 685.212 (d) or (e) on a loan that was consolidated into a joint Direct Consolidation Loan and the borrower's spouse does not meet the requirements for any type of discharge described in § 685.212, the Secretary discharges a portion of the consolidation loan equal to the amount of the loan that would have been eligible for discharge under the provisions of § 685.212 (d) or (e), as applicable.

(Authority: 20 U.S.C. 1078-8, 1087a et seq.)

SUBPART C—REQUIREMENTS, STANDARDS, AND PAYMENTS FOR DIRECT LOAN PROGRAM SCHOOLS

§ 685.300 *Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.*

(a) *General.* (1) Participation of a school in the Direct Loan Program means that eligible students at the school may receive Direct Loans. To participate in the Direct Loan Program, a school shall—

(i) Demonstrate to the satisfaction of the Secretary that the school meets the requirements for eligibility under the Act and applicable regulations; and

(ii) Enter into a written program participation agreement with the Secretary.

(2) The chief executive officer of the school shall sign the program participation agreement on behalf of the school.

(b) *Program participation agreement.* In the program participation agreement, the school shall promise to comply with the Act and applicable regulations and shall agree to—

(1) Identify eligible students who seek student financial assistance at the institution in accordance with section 484 of the Act;

(2) Estimate the need of each of these students as required by part F of the Act for an academic year. For purposes of estimating need, a Direct Unsubsidized Loan, a Direct PLUS Loan, or any loan obtained under any State-sponsored or

private loan program may be used to offset the expected family contribution of the student for that year;

(3) Certify that the amount of the loan for any student under part D of the Act is not in excess of the annual limit applicable for that loan program and that the amount of the loan, in combination with previous loans received by the borrower, is not in excess of the aggregate limit for that loan program;

(4) Set forth a schedule for disbursement of the proceeds of the loan in installments, consistent with the requirements of section 428G of the Act;

(5) Provide timely and accurate information to the Secretary for the servicing and collecting of loans—

(i) Concerning the status of student borrowers (and students on whose behalf parents borrow) while these students are in attendance at the school;

(ii) Upon request by the Secretary, concerning any new information of which the school becomes aware for these students (or their parents) after the student leaves the school; and

(iii) Concerning student eligibility and need, for the alternative origination of loans to eligible students and parents in accordance with part D of the Act;

(6) Provide assurances that the school will comply with requirements established by the Secretary relating to student loan information with respect to loans made under the Direct Loan Program;

(7) Provide that the school will accept responsibility and financial liability stemming from its failure to perform its functions pursuant to the agreement;

(8) Provide that eligible students at the school and their parents may participate in the programs under part B of the Act at the discretion of the Secretary for the period during which the school participates in the Direct Loan Program under part D of the Act, except that a student may not receive loans under both part D of the Act and part B of the Act for the same period of enrollment and a parent (borrowing for the same student) may not receive loans under both part D of the Act and part B of the Act for the same period of enrollment;

(9) Provide for the implementation of a quality assurance system, as established by the Secretary and developed in consultation with the school, to ensure that the school is complying with program requirements and meeting program objectives;

(10) Provide that the school will not charge any fees of any kind, however described, to student or parent borrowers for origination activities or the provision of any information

necessary for a student or parent to receive a loan under part D of the Act or any benefits associated with such a loan; and

(11) Comply with other provisions that the Secretary determines are necessary to protect the interests of the United States and to promote the purposes of part D of the Act.

(c) *Origination.* (1) If a school or consortium originates loans in the Direct Loan Program, it shall enter into a supplemental agreement that—

(i) Provides that the school or consortium will originate loans to eligible students and parents in accordance with part D of the Act; and

(ii) Provides that the note or evidence of obligation on the loan is the property of the Secretary.

(2) The chief executive officer of the school shall sign the supplemental agreement on behalf of the school.

(Authority: 20 U.S.C. 1087a *et seq.*, 1094)

§ 685.301 Certification of a loan by a Direct Loan Program school.

(a) *Determining eligibility and loan amount.* (1) A school participating in the Direct Loan Program shall ensure that any information it provides to the Secretary in connection with loan origination is complete and accurate. Except as provided in 34 CFR Part 668, subpart E, a school may rely in good faith upon statements made in the application by the student.

(2) A school shall provide to the Secretary borrower information that includes but is not limited to—

(i) The borrower's eligibility for a loan, as determined in accordance with §§ 685.200 and 685.203;

(ii) The student's loan amount; and

(iii) The anticipated and actual disbursement date or dates and disbursement amounts of the loan proceeds.

(3) A school may not certify a Direct Subsidized, Direct Unsubsidized, or Direct PLUS Loan, or a combination of loans, for an amount that—

(i) The school has reason to know would result in the borrower exceeding the annual or maximum loan amounts in § 685.203; or

(ii) Exceeds the student's estimated cost of attendance less—

(A) The student's estimated financial assistance for that period; and

(B) In the case of a Direct Subsidized Loan, the borrower's expected family contribution for that period.

(4)(i) A school determines a Direct Subsidized or Direct Unsubsidized Loan amount in accordance with § 685.203 and the definitions in 34 CFR 668.2 for the proration of loan amounts required for undergraduate students.

(ii) When prorating a loan amount for a student enrolled in a program of study with less than a full academic year remaining, the school need not recalculate the amount of the loan if the number of hours for which an eligible student is enrolled changes after the school certifies the loan.

(5) A school may refuse to certify a Direct Subsidized, Direct Unsubsidized, or Direct PLUS Loan or may reduce the borrower's determination of need for the loan if the reason for that action is documented and provided to the student in writing, and if—

(i) The determination is made on a case-by-case basis;

(ii) The documentation supporting the determination is retained in the student's file; and

(iii) The school does not engage in any pattern or practice that results in a denial of a borrower's access to Direct Loans because of the borrower's race, gender, color, religion, national origin, age, disability status, or income.

(6) A school may not assess a fee for the completion or certification of any Direct Loan Program forms or information.

(b) *Determining disbursement dates and amounts.* (1) Before disbursing a loan, a school that originates loans shall determine that all information required by the loan application and promissory note has been provided by the borrower and, if applicable, the student.

(2) Except as provided in paragraph (b)(3) of this section, a school shall establish disbursement dates for any Direct Loan made for a period of enrollment as follows:

(i) Except as provided in paragraph (b)(2)(iv) of this section, disbursements must be in two or more installments.

(ii) No installment may exceed one-half the loan.

(iii) At least one-half of the loan period must elapse before the second installment is disbursed except as necessary to permit the second installment to be disbursed at the beginning of the next semester, quarter, or similar division of the loan period.

(iv) If at least one-half of the loan period has elapsed when the first disbursement is made, the loan may be disbursed in a single installment.

(3) A school that is not in a State is not required to establish disbursement dates under paragraph (b)(2) of this section.

(c) *Promissory note handling.* (1) The Secretary provides promissory notes for use in the Direct Loan Program. A school may not modify, or make any additions to, the promissory note without the Secretary's prior written approval.

(2) A school that originates a loan shall provide to the Secretary an executed, legally enforceable promissory note as proof of the borrower's indebtedness.

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.302 Schedule requirements for courses of study by correspondence.

(a) This section contains requirements relating to the enrollment status of students in schools that offer programs of study by correspondence.

(b) A school that offers a course of study by correspondence shall establish a schedule for submission of lessons by its students and provide it to a prospective student prior to the student's enrollment.

(c) The school shall include in its schedule—

(1) A due date for each lesson in the course;

(2) A description of the options, if any, available to the student for altering the sequence of lesson submissions from the sequence in which they are otherwise required to be submitted;

(3) The date by which the course is to be completed; and

(4) The date by which any resident training must begin, the location of any resident training, and the period of time within which that resident training must be completed.

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.303 Processing loan proceeds and counseling borrowers.

(a) *Purpose.* This section establishes rules governing a school's processing of a borrower's Direct Subsidized, Direct Unsubsidized, or Direct PLUS Loan proceeds, and for counseling borrowers. The school shall also comply with any rules for processing loan proceeds contained in 34 CFR Part 668.

(b) *General.*—(1)(i) A school that initiates the drawdown of funds. A school may not disburse loan proceeds to a borrower unless the school has obtained an executed, legally enforceable promissory note from the borrower.

(ii) A school that does not initiate the drawdown of funds. A school may disburse loan proceeds only to a borrower for whom the school has received funds from the Secretary.

(2)(i) Except in the case of a late disbursement under paragraph (d) of this section, or as provided in paragraph (b)(2)(iii) of this section, a school may disburse loan proceeds only to a student whom the school determines has continuously maintained eligibility in accordance with the provisions of § 685.200 from the beginning of the loan period described in the promissory note.

(ii) If, after a school makes the first disbursement to a borrower, the student becomes ineligible due solely to the school's loss of eligibility to participate in the title IV programs or the Direct Loan Program, the school may make subsequent disbursements to the borrower as permitted by 34 CFR Part 668.

(iii) If, prior to making any disbursement to a borrower, the student temporarily ceases to be enrolled on at least a half-time basis, the school may make a disbursement and any subsequent disbursement to the student if the school determines and documents in the student's file—

(A) That the student has resumed enrollment on at least a half-time basis;

(B) The student's revised cost of attendance; and

(C) That the student continues to qualify for the entire amount of the loan, notwithstanding any reduction in the student's cost of attendance caused by the student's temporary cessation of enrollment on at least a half-time basis.

(3) If a registered student withdraws or is expelled prior to the first day of classes of the period of enrollment for which the loan is made, or fails to attend school during that period, or if the school is unable for any other reason to document that the student attended school during that period, the school shall notify the Secretary, within 30 days of the date described in § 685.304(a), of the student's withdrawal, expulsion, or failure to attend school, as applicable, and return to the Secretary—

(i) Any loan proceeds credited by the school to the student's account; and

(ii) The amount of payments made by the student to the school, to the extent that they do not exceed the amount of any loan proceeds disbursed by the school to the student.

(4) If a student is enrolled in the first year of an undergraduate program of study and has not previously received a Federal Stafford, Federal Supplemental Loans for Students, Direct Subsidized, or Direct Unsubsidized Loan, a school may not disburse the proceeds of a Direct Subsidized or Direct Unsubsidized Loan until 30 days after the first day of the student's program of study.

(c) *Processing of the proceeds of a Direct Loan.*—(1) *Schools that use student accounts.* After a student has registered, a school that uses student accounts shall—

(i) Credit the amount of the loan proceeds to the student's account not more than 21 days prior to the first day of the period of enrollment;

(ii) Notify the borrower in writing that it has so credited that account; and

(iii) Make available to the borrower the remaining loan proceeds. The school shall make remaining loan proceeds available to the borrower no sooner than 10 days before the first day of the period of enrollment and no later than 45 days after disbursement. For purposes of this paragraph, the "remaining loan proceeds" means those proceeds that remain after the allowable charges owed to the school by the student have been satisfied.

(2) *Schools that do not use student accounts.* After a student has registered, a school that does not use student accounts shall, no sooner than 10 days before the first day of the period of enrollment, disburse the loan to the borrower.

(3) *Proceeds held for the benefit of a student.* Upon the written request of the student, the school, as a fiduciary for the benefit of the student, may hold loan proceeds in order to assist the student in managing his or her loan funds for the remainder of the academic year. The school shall maintain these funds in a separate account established solely for the purpose of holding students' funds and may not commingle them with other funds or use them for any other purpose.

(d) *Late disbursement.* (1) For purposes of this paragraph, a disbursement is late if the school delivers loan proceeds—

(i) After the loan period; or
(ii) Before the end of the loan period but after the student ceased to be enrolled at the school on at least a half-time basis.

(2) Except as provided in paragraph (d)(4) of this section, a school may not make any late disbursement beyond the 60th day after the applicable condition in paragraph (d)(1) of this section.

(3) Notwithstanding paragraph (d)(4) of this section, a school may not make—

(i) A late subsequent disbursement of a Direct Subsidized or Direct Unsubsidized Loan to a borrower who has ceased to be enrolled on at least a half-time basis unless the borrower has graduated or successfully completed the period of enrollment for which the loan was intended; or

(ii) Any late disbursement that, under 34 CFR Part 668, is considered to be awarded for a period in which the student was not enrolled on at least a half-time basis at the school.

(4) In exceptional circumstances, a school may make a disbursement within 30 days after the period described in (d)(2) of this section. If it does so, the school shall document the exceptional circumstances in the student's file.

(e) *Initial counseling.* (1) Except as provided in paragraph (e)(5) of this section, a school shall conduct initial counseling prior to making the first disbursement of the proceeds of a Direct Subsidized or Direct Unsubsidized Loan to a borrower unless—

(i) The borrower enrolled in a correspondence program or a study-abroad program approved for credit at the home school; or

(ii) The borrower has received a prior Direct Subsidized, Direct Unsubsidized, Federal Stafford, Federal Unsubsidized Stafford, or Federal SLS Loan.

(2) The counseling must be in person, by audiovisual presentation, or by computer-assisted technology. In each case, the school shall ensure that an individual with knowledge of the title IV programs is reasonably available shortly after the counseling to answer the borrower's questions regarding those programs. In the case of a student enrolled in a correspondence program or a study-abroad program approved for credit at the home school, the school shall provide the borrower with written counseling materials by mail prior to disbursing the loan proceeds.

(3) In conducting the initial counseling, the school shall—

(i) Emphasize to the borrower the seriousness and importance of the repayment obligation the borrower is assuming;

(ii) Describe in forceful terms the likely consequences of default, including adverse credit reports, garnishment of wages, and litigation;

(iii) Provide the borrower with general information with respect to the average indebtedness of students who have obtained Direct Subsidized or Direct Unsubsidized Loans for attendance at that school or in the borrower's program of study; and

(iv) Inform the student as to the average anticipated monthly repayment for those students based on the average indebtedness provided under paragraph (e)(2)(iii) of this section.

(4) Additional matters that the Secretary recommends that a school include in the initial counseling session or materials are set forth in Appendix D to 34 CFR Part 668.

(5) A school may adopt an alternative approach for initial counseling as part of the school's quality assurance plan described in § 685.300(b)(9). If a school adopts an alternative approach, it is not required to meet the requirements of paragraphs (e)(1)–(3) of this section unless the Secretary determines that the alternative approach is not adequate. The alternative approach must—

(i) Ensure that each borrower subject to initial counseling under paragraph

(e)(1) of this section receives written counseling materials that contain the information described in paragraph (e)(3) of this section;

(ii) Be designed to target those students who are most likely to default on their repayment obligations and provide them more intensive counseling and support services; and

(iii) Include performance measures that demonstrate the effectiveness of the school's alternative approach.

(f) *Exit counseling.* (1) A school shall conduct in-person exit counseling with each Direct Subsidized or Direct Unsubsidized Loan borrower shortly before the borrower ceases at least half-time study at the school, except that—

(i) In the case of a correspondence program, the school shall provide the borrower with written counseling materials by mail within 30 days after the borrower completes the program; and

(ii) If the borrower withdraws from school without the school's prior knowledge or fails to attend an exit counseling session as scheduled, the school shall mail written counseling materials to the borrower at the borrower's last known address within 30 days after the school learns that the borrower has withdrawn from school or failed to attend the scheduled session.

(2) In conducting the exit counseling, the school shall—

(i) Inform the student of the average anticipated monthly repayment amount based on the student's indebtedness;

(ii) Review for the borrower available repayment options including the standard repayment, extended repayment, graduated repayment, and income contingent repayment plans, and loan consolidation;

(iii) Provide options to the borrower concerning those debt-management strategies that the school determines would facilitate repayment by the borrower;

(iv) Explain to the borrower how to contact the party servicing the student's Direct Loans;

(v) Meet the requirements described in paragraphs (e)(3) (i) and (ii) of this section;

(vi) Review with the borrower the conditions under which the borrower may defer repayment or obtain cancellation of a loan; and

(vii) Require the borrower to provide corrections to the school's records concerning name, address, social security number, references, and driver's license number, as well as the name and address of the borrower's expected employer (if known). The school shall provide this information to the Secretary within 60 days.

(3) Additional matters that the Secretary recommends that a school include in the exit counseling session or materials are set forth in Appendix D to 34 CFR Part 668.

(4) The school shall maintain in the student borrower's file documentation substantiating the school's compliance with paragraphs (e) and (f) of this section as to that borrower.

(g) *Treatment of excess loan proceeds.* Before the disbursement of any Direct Subsidized or Direct Unsubsidized Loan proceeds, if a school learns that the borrower will receive or has received financial aid for the period of enrollment for which the loan was intended that exceeds the amount of assistance for which the student is eligible, the school shall reduce or eliminate the overaward by either—

(1) Using the student's Direct Unsubsidized, Direct PLUS, or State-sponsored or another non-Federal loan to cover the expected family contribution, if not already done; or

(2) Reducing one or more subsequent disbursements to eliminate the overaward.

(Authority: 20 U.S.C. 1087a *et seq.*)

§ 685.304 Determining the date of a student's withdrawal.

(a) A school shall follow the procedures in 34 CFR 668.22(i) in determining the student's date of withdrawal.

(b) The school shall use the date determined under paragraph (a) of this section for the purpose of reporting to the Secretary the student's date of withdrawal and for determining when a refund must be paid under § 685.305.

(Authority: 20 U.S.C. 1087a *et seq.*)

§ 685.305 Payment of a refund to the Secretary.

(a) *General.* By applying for a Direct Loan, a borrower authorizes the school to pay directly to the Secretary that portion of a refund from the school that is allocable to the loan. A school—

(1) Shall pay that portion of the student's refund that is allocable to a Direct Loan to the Secretary; and

(2) Shall provide simultaneous written notice to the borrower if the school pays a refund to the Secretary on behalf of that student.

(b) *Determination, allocation, and payment of a refund.* In determining the portion of a student's refund that is allocable to a Direct Loan, the school shall follow the procedures established in 34 CFR 668.22 for allocating and paying a refund that is due.

(Authority: 20 U.S.C. 1087a *et seq.*)

§ 685.306 Withdrawal procedure for schools participating in the Direct Loan Program.

(a) A school participating in the Direct Loan Program may withdraw from the program by providing written notice to the Secretary.

(b) A participating school that intends to withdraw from the Direct Loan Program shall give at least 60 days notice to the Secretary.

(c) Unless the Secretary approves an earlier date, the withdrawal is effective on the later of—

- (1) 60 days after the school notifies the Secretary; or
- (2) The date designated by the school.

(Authority: 20 U.S.C. 1087a *et seq.*)

§ 685.307 Remedial actions.

(a) *General.* The Secretary may require the repayment of funds and the purchase of loans by the school if the Secretary determines that the unenforceability of a loan or loans, or the disbursement of loan amounts for which the borrower was ineligible, resulted in whole or in part from—

- (1) The school's violation of a Federal statute or regulation; or
- (2) The school's negligent or willful false certification.

(b) In requiring a school to repay funds to the Secretary or to purchase loans from the Secretary in connection with an audit or program review, the Secretary follows the procedures described in 34 CFR Part 668, Subpart H.

(c) The Secretary may impose a fine or take an emergency action against a school or limit, suspend, or terminate a school's participation in the Direct Loan Program in accordance with 34 CFR Part 668, Subpart G.

(Authority: 20 U.S.C. 1087a *et seq.*)

§ 685.308 Administrative and fiscal control and fund accounting requirements for schools participating in the Direct Loan Program.

(a) *General.* A participating school shall—

(1) Establish and maintain proper administrative and fiscal procedures and all necessary records as set forth in this part and in 34 CFR Part 668 in order to—

(i) Protect the rights of student and parent borrowers;

(ii) Protect the United States from unreasonable risk of loss; and

(iii) Comply with specific requirements in those regulations; and

(2) Submit all reports required by this part and 34 CFR Part 668 to the Secretary.

(b) *Student status confirmation reports.* A school shall—

(1) Upon receipt of a student status confirmation report from the Secretary, complete and return that report to the Secretary within 30 days of receipt; and

(2) Unless it expects to submit its next student status confirmation report to the Secretary within the next 60 days, notify the Secretary within 30 days if it discovers that a Direct Subsidized, Direct Unsubsidized, or Direct PLUS Loan has been made to or on behalf of a student who—

(i) Enrolled at that school but has ceased to be enrolled on at least a half-time basis; or

(ii) Has been accepted for enrollment at that school but failed to enroll on at least a half-time basis for the period for which the loan was intended.

(3) The Secretary provides student status confirmation reports to a school at least semi-annually.

(4) The Secretary may provide the student status confirmation report in either paper or electronic format.

(c) *Record retention requirements.* Unless otherwise directed by the Secretary, the school or its successors—

(1) Shall keep all records required under this part for five years following the student's last day of attendance at the school;

(2) Shall keep copies of reports and other forms used by the school relating to the Federal Direct Stafford, Federal Direct Unsubsidized Stafford, or Federal Direct PLUS Loan Programs for five years after completion;

(3) Shall keep all records involved in any loan, claim, or expenditure questioned by a Federal audit until resolution of any audit questions.

(4) In the event of the school's closure, termination, suspension, or change in ownership resulting in a change of control as described in 34 CFR Part 600, shall provide for the retention of the records and reports required by this part and for access by the Secretary or the Secretary's authorized representatives to those records and reports for inspection and copying; and

(5) May keep files, records, and copies of reports in microform or other media formats.

(d) *Loan record requirements.* In addition to the records required by 34 CFR Part 668, for each Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loan received under this part by or on behalf of its students, a school shall maintain a copy of any application data submitted to the Secretary and shall, upon request, produce a record of—

(1) The amount of the loan and the loan period;

(2) The data in an individual student budget or the school's itemized standard budget that were used in calculating the student's estimated cost of attendance;

(3) The sources and amounts of financial assistance available to the student that the school used in determining the student's estimated financial assistance for the loan period in accordance with § 685.102;

(4) The amount of the student's tuition and fees paid for the loan period and the date the student paid the tuition and fees;

(5) The amount and basis of its calculation of any refund paid to or on behalf of a student;

(6) In the case of a Direct Subsidized Loan under § 685.200, the data used to determine the student's expected family contribution;

(7) In the case of a Direct Subsidized, Direct Unsubsidized, or Direct PLUS Loan, the date of each disbursement of the loan.

(8) The information collected at the exit interview; and

(9) Any other matter for which a record would be required for the school to be able to document its compliance with applicable requirements with respect to the loan.

(e) *Inspection requirements.* Upon request, a school or its agent shall cooperate with an independent auditor, the Secretary, the Department of Education Office of Inspector General, and the Comptroller General of the United States, or their authorized representatives, in the conduct of audits, investigations, and program reviews authorized by law. This cooperation must include—

(1) Providing timely access for examination and copying of the records (including computerized records) required by the applicable regulations and to any other pertinent books, documents, papers, computer programs, and records; and

(2) Providing reasonable access to school personnel associated with the school's administration of the programs under title IV of the Act for the purpose of obtaining information relating to the school's administration of the programs under title IV of the Act. In providing reasonable access, the school may not—

(i) Refuse to supply any information regarding the school's administration of the programs under title IV of the Act deemed relevant by the Secretary;

(ii) Refuse to permit interviews with those personnel without the presence of representatives of the school's management; and

(iii) Refuse to permit interviews with school personnel unless they are recorded by the school.

(f) *Information sharing.* (1) Upon request by the Secretary, a school promptly shall provide the Secretary with any information the school has regarding the last known address, surname, employer, and employer address of a borrower who attends or has attended the school.

(2) If the school discovers that a student who is enrolled and who has received a Direct Subsidized or Direct Unsubsidized Loan has changed his or her permanent address, the school shall notify the Secretary.

(g) *Accounting requirements.* (1) A school shall establish and maintain on a current basis financial records that reflect all transactions for the bank account specified in paragraph (h)(1) of this section. The school shall establish and maintain general ledger control accounts and related subsidiary accounts that identify each program transaction and separately account for those transactions.

(2) The school shall account for receiving and expending Direct Loan Program funds in accordance with generally-accepted accounting principles.

(h) *Direct Loan Program bank account.* (1) The school shall establish and maintain a bank account as trustee for the Secretary and the borrower for Direct Loan Program funds. The school shall notify the bank in writing that the Direct Loan Program account contains Federal funds. In addition, the school shall ensure that the word "Federal" is in the name of the school's Direct Loan Program account. Unless the Secretary requires otherwise, the school's Direct Loan Program account need not be a separate bank account.

(2) Any interest earned on Direct Loan Program funds deposited in the school's account is considered Federal funds and must be returned to the Secretary.

(i) *Division of functions.* A school shall divide the functions of authorizing payments and disbursing funds to borrowers so that no single office has responsibility for both functions under the Direct Loan Program.

(j) *Limit on use of funds.* Except for funds paid to a school under section 452(b)(1) of the Act, funds received by a school under this part may be used only to make Direct Loans to eligible borrowers and may not be used or hypothecated for any other purpose.

(Authority: 20 U.S.C. 1087a et seq.)

Subpart D—School Participation and Loan Origination in the Direct Loan Program

§ 685.400 School participation requirements for academic years 1996–1997 and beyond.

(a) In order to participate in the Direct Loan Program, a school must meet the eligibility requirements in section 435(a) of the Act, including the requirement that it have a cohort default rate of less than 25 percent for at least one of the three most recent fiscal years for which data are available unless the school is exempt from this requirement under section 435(a)(3)(C).

(b) In order to qualify for initial participation, the school must not be subject to an emergency action or a proposed or final limitation, suspension, or termination action under sections 428(b)(1)(T), 432(h), or 487(c) of the Act.

(c) If schools apply as a consortium, each school in the consortium must meet the requirements in paragraphs (a) and (b) of this section.

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.401 Selection criteria and process for academic years 1996–1997 and beyond.

(a) The Secretary selects schools to participate in the Direct Loan Program for an academic year beginning in 1996–1997 from among those that apply to participate.

(b) In evaluating an application from an eligible school, the Secretary—

(1) To the extent possible, selects schools that are reasonably representative of the schools that are participating in the FFEL Program in terms of anticipated loan volume, length of academic program, control of the school, highest degree offered, size of student enrollment, geographic location, annual loan volume, and default experience; and

(2) In order to ensure an expeditious but orderly transition from the FFEL Program to the Direct Loan Program, selects schools that the Secretary believes will make the transition as smooth as possible.

(Authority: 20 U.S.C. 1087a et seq.)

§ 685.402 Criteria for schools to originate loans for academic years 1996–1997 and beyond.

(a) *Initial determination of origination status.* (1) Standard origination. Any school eligible to participate in the Direct Loan Program under § 685.400 is eligible to participate under standard origination.

(2) *School Origination.* To be eligible to originate loans, a school must meet the following criteria:

(i) Have participated in the Federal Perkins Loan Program or the Federal Pell Grant Program or, for a graduate and professional school, a similar program for the three most recent years preceding the date of application to participate in the Direct Loan Program.

(ii) If participating in the Federal Pell Grant Program, not be on the reimbursement system of payment.

(iii) In the opinion of the Secretary, have had no severe performance deficiencies for any of the programs under title IV of the Act, including deficiencies demonstrated by the most recent audit or program review.

(iv) Be financially responsible in accordance with the standards of 34 CFR 668.15.

(v) Be current on program and financial reports and audits required under title IV of the Act for the 12-month period immediately preceding the date of application to participate in the Direct Loan Program.

(vi) Be current on Federal cash transaction reports required under title IV of the Act for the 12-month period immediately preceding the date of application to participate in the Direct Loan Program and have no final determination of cash on hand that exceeds immediate title IV program needs.

(vii) Have no material findings in any of the annual financial audits submitted for the three most recent years preceding the date of application to participate in the Direct Loan Program.

(viii) Provide an assurance that the school has no delinquent outstanding debts to the Federal Government, unless—

(A) Those debts are being repaid under or in accordance with a repayment arrangement satisfactory to the Federal Government; or

(B) The Secretary determines that the existence or amount of the debts has not been finally determined by the cognizant Federal agency.

(3) A school that meets the criteria to originate loans may participate under school origination option 1 or 2 or under standard origination.

(b) *Change in origination status.* (1) After the initial determination of a school's origination status, the Secretary may allow a school that does not qualify to originate loans under either origination option 1 or origination option 2 to do so if the Secretary determines that the school is fully capable of originating loans under one of those options.

(2)(i) At any time after the initial determination of a school's origination status, a school participating under origination option 2 may request to

change to origination option 1 or standard origination, and a school participating under origination option 1 may request to change to standard origination.

(ii) The change in origination status becomes effective when the school receives notice of the Secretary's approval, unless the Secretary specifies a later date.

(3)(i) A school participating under origination option 1 may apply to participate under option 2, and a school participating in standard origination may apply to participate under either origination option 1 or 2 after one full year of participation in its initial origination status.

(ii) Applications to participate under another origination option are considered on an annual basis.

(iii) An application to participate under another origination option is evaluated on the basis of criteria and performance standards established by the Secretary, including but not limited to—

(A) Eligibility under paragraph (a)(2) of this section;

(B) Timely submission of accurate origination and disbursement records;

(C) Successful completion of reconciliation on a monthly basis; and

(D) Timely submission of completed and signed promissory notes, if applicable.

(iv) The change in origination status becomes effective when the school receives notice of the Secretary's approval, unless the Secretary specifies a later date.

(c) *Secretarial determination of change in origination status.* (1) At any time after a school has been approved to originate loans, the Secretary may require a school participating under origination option 2 to convert to option 1 or to standard origination and may require a school participating under origination option 1 to convert to standard origination.

(2) The Secretary may require a school to change origination status if the Secretary determines that such a change is necessary to ensure program integrity or if the school fails to meet the criteria and performance standards established by the Secretary, including but not limited to—

(i) For an origination option 1 school, eligibility under paragraph (a)(2) of this section, the timely submission of completed and signed promissory notes and accurate origination and disbursement records, and the successful completion of reconciliation on a monthly basis; and

(ii) For an origination option 2 school, the criteria and performance standards

required of origination option 1 schools and accurate and timely drawdown requests.

(3) The change in origination status becomes effective when the school receives notice of the Secretary's approval, unless the Secretary specifies a later date.

(d) *Origination by consortia.* A consortium of schools may participate under origination options 1 or 2 only if all members of the consortium are eligible to participate under paragraph (a)(2) of this section. All provisions of this section that apply to an individual school apply to a consortium.

(e) *School determination of change of Servicer.* (1) The Secretary assigns one or more Servicers to work with a school to perform certain functions relating to the origination and servicing of Direct Loans.

(2) A school may request the Secretary to designate a different Servicer. Documentation of the unsatisfactory performance of the school's current Servicer must accompany the request. The Servicer requested must be one of those approved by the Secretary for participation in the Direct Loan Program.

(3) The Secretary grants the request if the Secretary determines that—

(i) The claim of unsatisfactory performance is accurate and substantial; and

(ii) The Servicer requested by the school can accommodate such a change.

(4) If the Secretary denies the school's request based on a determination under paragraph (e)(3)(ii) of this section, the school may request another Servicer.

(5) The change in Servicer is effective when the school receives notice of the Secretary's approval, unless the Secretary specifies a later date.

(Authority: 20 U.S.C. 1087a et seq.)

Appendix A—Income Contingent Repayment

Examples of the Calculation of Monthly Repayment Amounts

Example 1. A single borrower with \$12,500 of Direct Loans and an Adjusted Gross Income (AGI) of \$25,000.

Step 1: Under either Option 1 or Option 2, calculate the payback rate. Because the borrower's debt is greater than \$1,000, the payback rate is calculated on the basis of the formula in § 685.209(b)(2)(iii), as follows:

• Subtract \$1,000 from the total amount of the borrower's Direct Loans: (\$12,500—\$1,000 = \$11,500).

• Multiply the result by 0.000002: (\$11,500 × 0.000002 = 0.023).

• Add the result to 0.04: (0.04 + 0.023 = 0.063).

• The result is the payback rate.

Step 2: Compare the calculated payback rate (0.063) to the maximum payback rate (0.15). Because the calculated rate is less than

the maximum rate, the borrower's payback rate is 0.063.

Step 3: Calculate the annual repayment amount by multiplying the borrower's AGI by the payback rate: (\$25,000 × 0.063 = \$1,575).

Step 4: Calculate the monthly repayment amount by dividing the annual repayment amount by 12 months: (\$1,575 ÷ 12 = \$131.25).

Step 5: Compare the calculated monthly repayment amount (\$131.25) to the \$25 minimum repayment amount. Because the calculated amount is greater than the minimum amount, the borrower's monthly repayment amount is \$131.25 under Option 1.

Step 6: If the borrower has chosen Option 2, compare the monthly repayment amount under Option 1 (\$131.25) to the amount the borrower would repay under a 12-year standard amortization. The Secretary calculates the 12-year standard amortization amount using the interest rate in effect when the borrower chose Option 2. If the interest rate was seven percent, the 12-year standard amortization amount is approximately \$128.50 (\$10.28 × 12.5). Because the monthly payment calculated under Option 1 (\$131.25) exceeds the 12-year standard amortization amount (\$128.50), the borrower's monthly repayment amount is \$128.50 under Option 2.

Example 2: Married borrowers with a combined Adjusted Gross Income (AGI) of \$30,000. The husband has \$5,000 of Direct Loans. The wife has \$15,000 of Direct Loans. The couple has two dependents.

Step 1: Under either Option 1 or Option 2, calculate the husband's payback rate.

Because his debt is greater than \$1,000, the payback rate is calculated on the basis of the formula in § 685.209(b)(2)(iii) as follows:

• Subtract \$1,000 from the amount of the husband's loans: (\$5,000—\$1,000 = \$4,000).

• Multiply the result by 0.000002: (\$4,000 × 0.000002 = 0.008).

• Add the result to 0.04:

(0.04 + 0.008 = 0.048).

• The result is the husband's payback rate.

Step 2: Compare the husband's calculated payback rate (0.048) to the maximum payback rate (0.15). Because the calculated rate is less than the maximum rate, the husband's payback rate is 0.048.

Step 3: Calculate the husband's assumed AGI by multiplying the couple's total AGI (\$30,000) by the amount of the husband's loans (\$5,000), divided by the total amount of the couple's debt (\$20,000): (\$30,000 × \$5,000 ÷ \$20,000 = \$7,500).

Step 4: Calculate the husband's annual repayment amount by multiplying the husband's assumed AGI (\$7,500) by his payback rate (0.048): (\$7,500 × 0.048 = \$360).

Step 5: Divide the annual repayment amount by 12 months: (\$360 ÷ 12 = \$30).

Step 6: Calculate the couple's total family size adjustment amount by multiplying the number of dependents (2) by \$7: (2 × \$7 = \$14).

Step 7: Calculate the couple's individual family size adjustment amounts by dividing the total family size adjustment (\$14) by 2: (\$14 ÷ 2 = \$7).

Step 8: Calculate the husband's monthly repayment amount by subtracting his family

size adjustment amount (\$7) from the amount calculated in Step 5 (\$30): (\$30 - \$7 = \$23).

Step 9: Calculate the wife's payback rate. Because her debt is greater than \$1,000, the payback rate is calculated on the basis of the formula in § 685.209(b)(2)(iii) as follows:

- Subtract \$1,000 from the amount of the wife's loans: (\$15,000 - \$1,000 = \$14,000).
- Multiply the result by 0.000002:
(\$14,000 × 0.000002 = 0.028).
- Add the result to 0.04:
(0.04 + 0.028 = 0.068).

• The result is the wife's payback rate.

Step 10: Compare the wife's calculated payback rate (0.068) to the maximum payback rate (0.15). Because the calculated rate is less than the maximum rate, the wife's payback rate is 0.068.

Step 11: Calculate the wife's assumed AGI by multiplying the couple's total AGI (\$30,000) by the amount of the wife's loans (\$15,000), divided by the total amount of the

couple's debt (\$20,000):
(\$30,000 × \$15,000 ÷ \$20,000 = \$22,500).

Step 12: Calculate the wife's annual repayment amount by multiplying the wife's assumed AGI (\$22,500) by her payback rate (0.068): (\$22,500 × 0.068 = \$1,530).

Step 13: Divide the annual repayment amount by 12 months: (\$1,530 ÷ 12 = \$127.50).

Step 14: Calculate the wife's monthly repayment amount by subtracting her family size adjustment amount calculated in Step 7 (\$7) from the amount calculated in Step 13 (\$127.50): (\$127.50 - \$7 = \$120.50).

Step 15: Calculate the couple's combined monthly repayment amount by adding the husband's monthly repayment amount calculated in Step 8 (\$23) and the wife's monthly repayment amount calculated in Step 14 (\$120.50): (\$23 + \$120.50 = \$143.50).

Step 16: Compare the couple's combined monthly repayment amount (\$143.50) to the \$25 minimum repayment amount. Because the calculated amount is greater than the

minimum amount, the couple's combined monthly repayment amount is \$143.50 under Option 1.

Step 17: If the couple has chosen Option 2, compare the combined monthly repayment amount under Option 1 (\$143.50) to the amount the couple would repay under a 12-year standard amortization. The Secretary calculates the 12-year standard amortization amount using the interest rate in effect when the couple chose Option 2. If the interest rate was seven percent, the 12-year standard amortization amount is approximately \$10.28 for every \$1,000 of debt. In this example, the 12-year standard amortization amount is approximately \$205.60 (\$10.28 × 20). Because the monthly payment calculated under Option 1 (\$143.50) does not exceed the 12-year standard amortization amount (\$205.60), the couple's combined monthly repayment amount is \$143.50 under Option 2.

BILLING CODE 4000-01-P

Income Contingent Repayment Plan

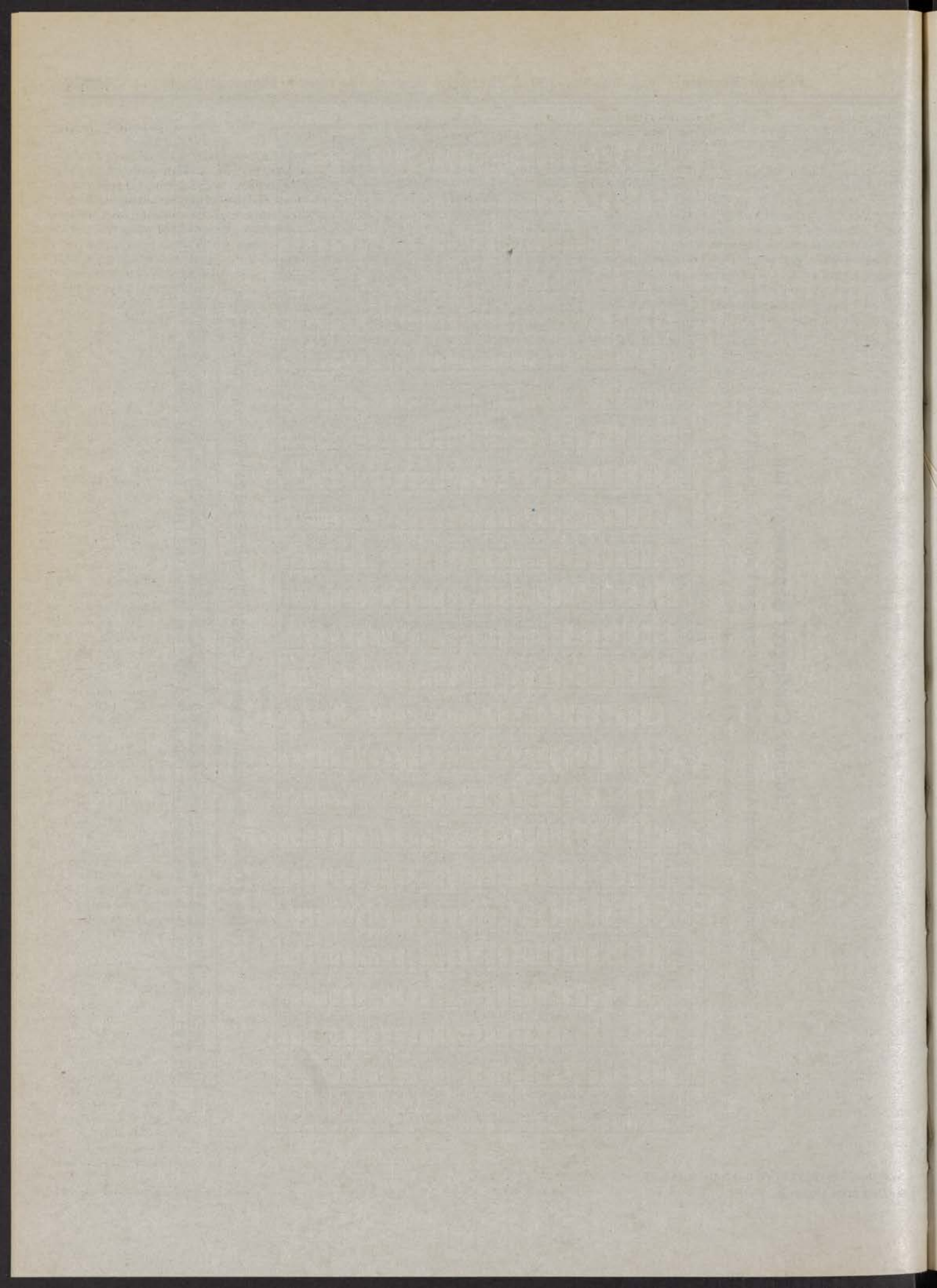
Sample Monthly Repayment Amounts for a Single Borrower at Various Income and Debt Levels Under Option 1

Use the table values if there are no dependents. Otherwise, subtract \$7 for each dependent other than a spouse, up to 5 dependents, and if the result is less than \$25 no payment is required.

Income	Initial Debt																							
	\$2,500	\$5,000	\$7,500	\$10,000	\$12,500	\$15,000	\$17,500	\$20,000	\$22,500	\$25,000	\$30,000	\$35,000	\$40,000	\$45,000	\$50,000	\$55,000	\$60,000	\$70,000	\$75,000	\$80,000	\$85,000	\$90,000	\$100,000	
\$1,000	\$0			\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
2,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	25	25	25	25	25	25	25	25
3,000	0	0	0	0	0	0	0	0	0	0	0	0	27	30	32	35	37	38	38	38	38	38	38	38
4,000	0	0	0	0	0	0	0	0	26	28	29	33	36	39	43	46	49	50	50	50	50	50	50	50
5,000	0	0	0	0	26	28	30	33	35	37	41	45	49	53	58	62	63	63	63	63	63	63	63	
6,000	0	0	27	29	32	34	37	39	42	44	49	54	59	64	69	74	75	75	75	75	75	75	75	
7,000	25	28	31	34	37	40	43	46	48	51	57	63	69	75	81	86	88	88	88	88	88	88	88	
8,000	29	32	35	39	42	45	49	52	55	59	65	72	79	85	92	99	100	100	100	100	100	100	100	
9,000	32	36	40	44	47	51	55	59	62	66	74	81	89	96	104	111	113	113	113	113	113	113	113	
10,000	36	40	44	48	53	57	61	65	69	73	82	90	98	107	115	123	125	125	125	125	125	125	125	
12,500	45	50	55	60	66	71	76	81	86	92	102	113	123	133	144	154	156	156	156	156	156	156	156	
15,000	54	60	66	73	79	85	91	98	104	110	123	135	148	160	173	185	188	188	188	188	188	188	188	
17,500	63	70	77	85	92	99	106	114	121	128	143	158	172	187	201	216	219	219	219	219	219	219	219	
20,000	72	80	88	97	105	113	122	130	138	147	163	180	197	213	230	247	250	250	250	250	250	250	250	
22,500	81	90	99	109	118	128	137	146	156	165	184	203	221	240	259	278	281	281	281	281	281	281	281	
25,000	90	100	110	121	131	142	152	163	173	183	204	225	246	267	288	308	313	313	313	313	313	313	313	
30,000	108	120	133	145	158	170	183	195	208	220	245	270	295	320	345	370	375	375	375	375	375	375	375	
35,000	125	140	155	169	184	198	213	228	242	257	286	315	344	373	403	432	438	438	438	438	438	438	438	
40,000	143	160	177	193	210	227	243	260	277	293	327	360	393	427	460	493	500	500	500	500	500	500	500	
45,000	161	180	199	218	236	255	274	293	311	330	368	405	443	480	518	555	563	563	563	563	563	563	563	
50,000	179	200	221	242	263	283	304	325	346	367	408	450	492	533	575	617	625	625	625	625	625	625	625	
55,000	197	220	243	266	289	312	335	358	380	403	449	495	541	587	633	678	688	688	688	688	688	688	688	
60,000	215	240	265	290	315	340	365	390	415	440	490	540	590	640	690	740	750	750	750	750	750	750	750	
65,000	216	260	287	314	341	368	395	423	450	477	531	585	639	693	748	802	813	813	813	813	813	813	813	
70,000	216	280	309	338	368	397	426	455	484	513	572	630	688	747	805	863	875	875	875	875	875	875	875	
75,000	216	300	331	363	394	425	456	488	519	550	613	675	738	800	863	925	938	938	938	938	938	938	938	
80,000	216	320	353	387	420	453	487	520	553	587	653	720	787	853	920	987	1,000	1,000	1,000	1,000	1,000	1,000	1,000	
85,000	216	340	375	411	446	482	517	553	588	623	694	765	836	907	978	1,048	1,063	1,063	1,063	1,063	1,063	1,063	1,063	
90,000	216	360	398	435	473	510	548	585	623	660	735	810	885	960	1,035	1,110	1,125	1,125	1,125	1,125	1,125	1,125	1,125	
95,000	216	380	420	459	499	538	578	618	657	697	776	855	934	1,013	1,093	1,172	1,188	1,188	1,188	1,188	1,188	1,188	1,188	
100,000	216	400	442	483	525	567	608	650	692	733	817	900	983	1,067	1,150	1,233	1,250	1,250	1,250	1,250	1,250	1,250	1,250	

Under Option 2, the monthly repayment amount will never exceed the values in the following line:

	Initial Debt														
	\$2,500	\$5,000	\$7,500	\$10,000	\$12,500	\$15,000	\$17,500	\$20,000	\$22,500	\$25,000	\$30,000	\$35,000	\$40,000	\$45,000	\$50,000
\$26	\$26	\$51	\$77	\$103	\$129	\$154	\$180	\$206	\$231	\$257	\$309	\$360	\$411	\$463	\$514
\$51	\$51	\$77	\$103	\$129	\$154	\$180	\$206	\$231	\$257	\$309	\$360	\$411	\$463	\$514	\$566
\$77	\$77	\$103	\$129	\$154	\$180	\$206	\$231	\$257	\$309	\$360	\$411	\$463	\$514	\$566	\$617
\$103	\$103	\$129	\$154	\$180	\$206	\$231	\$257	\$309	\$360	\$411	\$463	\$514	\$566	\$617	\$668
\$129	\$129	\$154	\$180	\$206	\$231	\$257	\$309	\$360	\$411	\$463	\$514	\$566	\$617	\$668	\$720
\$154	\$154	\$180	\$206	\$231	\$257	\$309	\$360	\$411	\$463	\$514	\$566	\$617	\$668	\$720	\$771
\$180	\$180	\$206	\$231	\$257	\$309	\$360	\$411	\$463	\$514	\$566	\$617	\$668	\$720	\$771	\$823
\$206	\$206	\$231	\$257	\$309	\$360	\$411	\$463	\$514	\$566	\$617	\$668	\$720	\$771	\$823	\$874
\$231	\$231	\$257	\$309	\$360	\$411	\$463	\$514	\$566	\$617	\$668	\$720	\$771	\$823	\$874	\$926
\$257	\$257	\$309	\$360	\$411	\$463	\$514	\$566	\$617	\$668	\$720	\$771	\$823	\$874	\$926	\$1,028



Black-footed Ferret

Thursday
August 18, 1994

Part III

**Department of the
Interior**

Fish and Wildlife Service

50 CFR Part 17

**Endangered and Threatened Wildlife and
Plants: Establishment of a Nonessential
Experimental Population of Black-Footed
Ferrets in Southwestern South Dakota;
Final Rule**

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AB98

Endangered and Threatened Wildlife and Plants: Establishment of a Nonessential Experimental Population of Black-Footed Ferrets in Southwestern South Dakota

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final Rule.

SUMMARY: The U.S. Fish and Wildlife Service, in cooperation with the U.S. Forest Service and the National Park Service, will release black-footed ferrets (*Mustela nigripes*) into the Conata Basin/Badlands Reintroduction Area in southwestern South Dakota. This reintroduction will implement a primary recovery action for this federally listed endangered species and will allow evaluation of release techniques.

Provided conditions are acceptable, surplus captive-raised black-footed ferrets will be released in 1994 and annually thereafter for several years or until a self-sustaining population is established. Releases will utilize and refine reintroduction techniques used at other reintroduction areas and, if fully successful, will establish a wild population within about 5 years. The Conata Basin/Badlands black-footed ferret population is designated as a nonessential experimental population in accordance with Section 10(j) of the Endangered Species Act of 1973, as amended. This population will be managed in accordance with the provisions of the accompanying special rule.

EFFECTIVE DATE: August 18, 1994.

ADDRESSES: The complete file for this rule is available for public inspection, by appointment, during normal business hours at the following Service offices:

- Regional Office, Ecological Services, 134 Union Boulevard, Lakewood, Colorado 80228, (303) 236-8189.
- South Dakota Field Office, Ecological Services, 420 South Garfield Avenue, Suite 400, Pierre, South Dakota 57501-5408, (605) 224-8693.

FOR FURTHER INFORMATION CONTACT: Mr. Ron Naten (303) 236-8189 at the Regional Office address or Mr. Douglas Searls (605) 224-8693 at the South Dakota Field Office address above.

SUPPLEMENTARY INFORMATION:

Background

The background information included in this rule has been reduced from what was published in the proposed rule to reduce publishing costs. Please refer to the proposed rule published in the *Federal Register* on May 19, 1993 (58 FR 29176) for more detailed information.

The black-footed ferret (*Mustela nigripes*) is an endangered carnivore with a black face mask, black legs, and a black-tipped tail. It is nearly 60 cm (2 ft) long and weighs up to 1.1 kg (2.5 lbs). It is the only ferret native to North America.

Though the black-footed ferret was found over a wide area historically, it is difficult to make a conclusive statement on its historical abundance due to its nocturnal and secretive habits. The black-footed ferret's historical range includes 12 States (Arizona, Colorado, Kansas, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming) and the Canadian Provinces of Alberta and Saskatchewan. There is prehistoric evidence of the black-footed ferret from the Yukon Territory, Canada, to New Mexico and Texas (Anderson et al. 1986). Although there are no specimen records for black-footed ferrets from Mexico, prairie dogs (*Cynomys* spp.) inhabit Chihuahua (Anderson 1972) and were present as far back as the late Pleistocene-Holocene Age (Messing 1986). Because black-footed ferrets depend almost exclusively on prairie dogs for food and shelter (Henderson et al. 1969; Forrest et al. 1985) and black-footed ferret range is coincident with that of prairie dogs (Anderson et al. 1986), it is probable that black-footed ferrets may have been historically endemic to northern Mexico.

Black-footed ferrets prey primarily on prairie dogs and use their burrows for shelter and denning. There are specimen records of black-footed ferrets from ranges of three species of prairie dogs: black-tailed prairie dogs (*Cynomys ludovicianus*), white-tailed prairie dogs (*Cynomys leucurus*), and Gunnison's prairie dogs (*Cynomys gunnisoni*) (Anderson et al. 1986).

Widespread poisoning of prairie dogs and agricultural cultivation of their habitat drastically reduced prairie dog abundance and distribution in the last century. Sylvatic plague, which may have been introduced to North America around the turn of the century, also decimated prairie dog populations, particularly in the southern portions of their range. The severe decline of prairie dogs resulted in a concomitant and

near-fatal decline in black-footed ferrets, though the latter's decline may be partially attributable to other factors such as secondary poisoning from prairie dog toxicants or high susceptibility to canine distemper. The black-footed ferret was listed as an endangered species on March 11, 1967.

In 1964, a wild population of ferrets was discovered in South Dakota and was studied intensively for several years, but this population disappeared in the wild by 1974, its last member dying in captivity in 1979. Afterwards, some believed that the species was probably extinct, until another wild population was discovered near Meeteetse, Wyoming, in 1981. The Meeteetse population underwent a severe decline in 1985 and 1986 due to canine distemper, which is fatal to infected black-footed ferrets. Eighteen survivors were taken into captivity between 1986 and 1987 to prevent extinction and to serve as founder animals in a captive propagation program aimed at eventually reintroducing the species into the wild.

In 6 years, the captive population has increased from 18 to over 300 black-footed ferrets. In 1988, the single captive population was split into three separate captive subpopulations to avoid the possibility that a single catastrophic event could wipe out the entire known population. Two additional captive subpopulations were established in 1990, and one additional captive subpopulation was established in 1991 and again in 1992, making a total of seven captive subpopulations. A secure population of 200 breeding adults was achieved in 1991, allowing initiation of ferret reintroductions into the wild.

Section 10(j) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), allows the Fish and Wildlife Service (Service) to designate certain populations of federally listed species that are released into the wild as "experimental populations." The circumstances under which this designation can be applied are: (1) The population is wholly separate geographically from nonexperimental populations of the same species (e.g., the population is reintroduced outside the species' current range but within its historical range); and (2) the Service determines that the release will further the conservation of the species. This designation can increase the Service's flexibility to manage a reintroduced population because under section 10(j) an experimental population can be treated as a threatened species regardless of its designation elsewhere in its range, and, under section 4(d) of

the Act, the Service has greater discretion in developing management programs for threatened species than for endangered species.

Section 10(j) of the Act requires, when an experimental population is designated, that a determination be made by the Service whether that population is essential or nonessential to the continued existence of the species. Nonessential experimental populations located outside National Wildlife Refuge System or National Park System lands are treated, for purposes of section 7 of the Act, as if they are proposed for listing. Thus, only two provisions of section 7 would apply outside National Wildlife Refuge System and National Park System lands: section 7(a)(1), which requires all Federal agencies to use their authorities to conserve listed species; and section 7(a)(4), which requires Federal agencies to confer with the Service on actions that are likely to jeopardize the continued existence of a proposed species. Section 7(a)(2) of the Act, which requires Federal agencies to insure that their activities are not likely to jeopardize the continued existence of a listed species, would not apply except on National Wildlife Refuge System and National Park System lands. Activities undertaken on private lands are not affected by section 7 of the Act unless they are authorized, funded, or carried out by a Federal agency.

However, pursuant to section 7(a)(2), individual animals comprising the designated experimental population may be removed from an existing source or donor population only after it has been determined that such removal is not likely to jeopardize the continued existence of the species. Moreover, removal must be conducted under a permit issued in accordance with the requirements of 50 CFR 17.22.

Forty-nine black-footed ferrets were reintroduced as a nonessential experimental population to the Shirley Basin/Medicine Bow (Shirley Basin) site in Wyoming in September and October 1991. Subsequent surveys conducted during November 7-14, 1991, found nine individual ferrets. Snow surveys conducted during March 1992 revealed signs of six to eight black-footed ferrets. Spotlight surveys conducted during July and August 1992 confirmed the presence of a minimum of four adult black-footed ferrets and two litters. One litter contained two young, and the second litter contained four young black-footed ferrets. During September and October 1992, an additional 90 black-footed ferrets were released at the Shirley Basin site. Forty-eight ferrets were released at the Shirley Basin site

in September and October 1993. Currently, the only known populations of black-footed ferrets are the experimental population at the Shirley Basin site and those animals in captivity.

In addition to this reintroduction, the Service and state wildlife agencies in 11 western states are identifying potential black-footed ferret reintroduction sites within the species' historical range. Potential reintroduction sites have been identified in Wyoming (two sites), Montana (one site), South Dakota (one site), Colorado (one site), Utah (one site), and Arizona (one site).

On May 19, 1993, the Service published a proposed rule in the *Federal Register* (58 FR 29176) to reintroduce black-footed ferrets into the Conata Basin/Badlands Reintroduction Area in southwestern South Dakota as a nonessential experimental population. This area is located in eastern Pennington County, South Dakota, and was historically occupied by black-footed ferrets. The Reintroduction Area is within the larger Experimental Population Area, which includes portions of Pennington, Jackson, and Shannon Counties. Numerous black-footed ferret surveys have been conducted in the Experimental Population Area and have not turned up any evidence of live black-footed ferrets. The latest physical evidence that black-footed ferrets occupied southwestern South Dakota occurred in 1974.

To the best of our knowledge, any reintroduced population of black-footed ferrets in the Experimental Population Area would be wholly separate and distinct from other black-footed ferret populations.

Conata Basin/Badlands Reintroduction Area: The Conata Basin/Badlands Reintroduction Area encompasses approximately 17,000 hectares (42,000 acres) of primarily Federal land administered either by the National Park Service (NPS) or the U.S. Forest Service (USFS). Mapping conducted in 1990 indicates that approximately 3,200 hectares (8,000 acres) of prairie dog towns exist at the Conata Basin/Badlands Reintroduction Area. Approximately 3,000 hectares (7,400 acres) had prairie dog densities that would be considered good ferret habitat; the remaining hectares were recovering from previous control efforts. Using the method outlined in Biggins et al. (1991), this acreage has a present black-footed ferret habitat index of about 160. When additional parameters, such as spacial requirements, were incorporated into the indexing system, this area had a ferret habitat index of approximately 100.

Reintroduction and black-footed ferret management will occur in specifically delineated areas designated as the "Conata Basin/Badlands Reintroduction Area." The Reintroduction Area is centered within the larger Experimental Population Area which includes portions of eastern Pennington, western Jackson, and northern Shannon Counties. Any black-footed ferret occurring within the Experimental Population Area will have experimental status.

Specifics on the location and boundaries of the Conata Basin/Badlands Reintroduction Area and Experimental Population Area are provided in the map accompanying the special rule. Current plans are to begin releasing black-footed ferrets into a subportion of the Conata Basin/Badlands Reintroduction Area considered best for release and initial management. If reintroduction is successful, black-footed ferrets eventually will disperse from the initial Reintroduction Area. Black-footed ferrets may be released into other portions of the Conata Basin/Badlands Reintroduction Area at a later date.

Black-footed ferrets will be released into the Reintroduction Area only if biological conditions are suitable and an acceptable management framework has been developed. Reintroduction will be re-evaluated if one or more of the following conditions specified in the "Draft Cooperative Black-Footed Ferret Management Plan For The Conata Basin/Badlands Area In South Dakota" (USFWS, USFS, and NPS 1993) occur:

- (1) Failure to maintain a black-footed ferret habitat rating index (Biggins et al. 1991) of at least 26 (i.e., carrying capacity for 40 adult black-footed ferrets) or a strong indication that such will be the case within 5 years.
 - (2) Failure to acquire or maintain a nonessential experimental population designation for the Reintroduction Area through the Federal rulemaking process.
 - (3) Wild black-footed ferret populations are discovered within the Experimental Population Area prior to the first breeding season following the first reintroduction.
 - (4) A significant number of cases of canine distemper or other diseases determined to be detrimental to black-footed ferrets is documented in any wild mammal in or near the Reintroduction Area within 6 months of the scheduled reintroduction.
 - (5) Fewer than 20 black-footed ferrets are available for the first release.
 - (6) Funding is not available to implement the reintroduction program.
- Reintroduction protocol:* In general, the reintroduction protocol will involve

releasing a minimum of 20 captive-raised black-footed ferrets in the first year of reintroduction and releasing ferrets annually thereafter, as needed, for 2-4 years or until a wild population is established. Captive animals selected for release will be as genetically redundant as possible with the gene pool in the captive breeding population; hence, any loss of released animals is unlikely to appreciably affect existing genetic diversity in the species. Moreover, because breeding black-footed ferrets in captivity is not a problem, any animals lost in the reintroduction effort could be replaced. To enhance genetic diversity in the reintroduced population, it may be necessary to release black-footed ferrets from other established, reintroduced populations (e.g., the Shirley Basin site).

Several strategies for releasing captive-raised black-footed ferrets will be utilized during the reintroduction: (1) Hard release with no pre-release conditioning (i.e., release without an acclimation period); (2) soft release (release with an acclimation period and gradual reduction in supplied food and shelter); and (3) pre-release conditioning in a quasi-natural environment followed by hard release (this technique may be used when sufficient numbers of black-footed ferrets are available). Ferrets will be released in September and October, when wild juvenile ferrets typically become independent and exhibit dispersal tendencies and are physically capable of killing prey, avoiding predators, and adjusting to environmental extremes.

The hard release with no pre-release conditioning will utilize neither release cages or any preconditioning in a contained prairie dog colony. Ferrets will be transported to the release site and held for a minimum of 12 hours to ensure general health. Subsequently, the ferrets will be released into the prairie dog colonies from the transport container and will receive no supplementary care.

The soft release technique is similar to that used in the initial releases in Wyoming. Release cages are situated at the release site, and black-footed ferrets are maintained in the cages for a few days to acclimate to the surroundings. After a few days, a tunnel (tube) is opened to allow the black-footed ferrets free egress and ingress. Food is supplied even after departure in case the black-footed ferrets need to return to a known food supply.

Pre-release conditioning prior to hard release will utilize black-footed ferrets raised from birth in a large, seminatural, enclosed prairie dog colony. In this design, the captive environment should

allow a natural expression of genetically influenced behaviors, or, if behaviors are learned, the captive environment should provide appropriate stimuli to learning during the critical period. Presenting juvenile captive animals with stimuli resembling those prevalent in their natural environment may help individuals retain efficient use of adaptive traits and, subsequently, increase post-release survival by reinforcing inherent survival skills in natural ways at natural periods of development.

Other types of release methods also could be tested. The rationale is to compare release techniques that are different from one another but to use techniques that seem reasonable.

Most releases will occur in September and October when the black-footed ferrets are about 18 weeks of age. However, releases during other times of the year remain an option. Once independent of artificial support, all black-footed ferrets will be managed in a similar manner.

Prior to release, ferrets will be vaccinated against disease, as appropriate, including canine distemper, if an effective vaccine is developed for black-footed ferret use (an experimental vaccine is now being tested). In areas other than Badlands National Park, preventative and, where necessary, corrective measures to reduce predation by coyotes (*Canis latrans*), badgers (*Taxidea taxus*), raptors, or other predators may be undertaken in the initial phases of the release but should not be necessary in the long term. Habitat conditions will be monitored continually during the reintroduction effort.

All black-footed ferrets released will be marked [e.g., with Passive Integrated Transponder (PIT) tags or non-toxic paints]. A sample of released ferrets may be radio-tagged and their behavior monitored. Other monitoring would include the use of spotlighting, snow surveys, or visual sighting techniques.

Realistically, the Service expects high natural mortality (up to 90 percent) among released black-footed ferrets in the first year of the reintroduction. Despite pre-release conditioning, captive-bred animals will be relatively naive in terms of avoiding predators, securing prey, and withstanding environmental rigors. Mortality is expected to be highest within the first month of release. A realistic goal for the first year would be to work toward enabling a few black-footed ferrets to survive at least 1 month after release with perhaps 10 percent of the released animals surviving the winter.

Intensive studies conducted on the wild Meeteetse population during the 1982-1986 period will provide a natural baseline against which the South Dakota reintroduction effort can be compared to determine how well the reintroduction experiments are proceeding. These baseline data will be supplemented with baseline biological and behavioral data taken from the South Dakota population in the 1960's and 1970's.

If successful, this reintroduction effort is expected to result in the establishment of a free-ranging population of at least 40 adult black-footed ferrets within the Conata Basin/Badlands Reintroduction Area by a target date of 1997 or 1998. The Service will evaluate project progress annually, including sources of mortality. The biological status of the population at this site will be re-evaluated within the first 5 years to determine future management needs. However, this 5-year evaluation will not include an evaluation to determine whether the nonessential experimental designation for the Conata Basin/Badlands population should be changed. The Service anticipates that the nonessential experimental designation for this population will not be changed unless the experiment is determined to be a failure (and this rulemaking is terminated) or until the species is determined to be recovered (and is delisted). Once recovery goals for delisting are met, a proposed rule to delist will be prepared.

The revised Black-footed Ferret Recovery Plan (Recovery Plan) (USFWS 1988) establishes objectives and outlines steps for recovery that, when accomplished, will provide for viable black-footed ferret populations in captivity and within its historical range. Recovery Plan objectives include:

(1) increasing the captive population of black-footed ferrets to a census size of 200 breeding adults by 1991 (this recovery goal subsequently was changed to 240 breeding adults and has been achieved);

(2) establishing a pre-breeding census population of 1,500 free-ranging black-footed ferret breeding adults in 10 or more populations with no fewer than 30 breeding adults in any population by the year 2010; and

(3) encouraging the widest possible distribution of reintroduced black-footed ferret populations.

Status of Reintroduced Population

The Conata Basin/Badlands population of black-footed ferrets will be designated a nonessential experimental population according to the provisions of Section 10(j) of the

Act. The basis for this designation is explained below.

The 1988 Recovery Plan states as one of its goals the development of a captive population containing a minimum of 200 breeding adults. This number was chosen to maintain the maximum genetic variability and to have enough animals to protect the species from a stochastic event; however, it has since been revised to 240 by the Species Survival Plan Group of the American Zoological and Aquarium Association, which manages the captive ferret population. To date, the captive program contains over 300 black-footed ferrets separated geographically into 7 different breeding facilities. With the recovery goal of 240 animals achieved, the captive population can now supply surplus ferrets for reintroduction efforts. As described in the Wyoming final rule (56 FR 41473), the captive population will be the donor population from which surplus ferrets will be taken for reintroduction activities. Without the protection of the donor or captive population, reintroduction efforts could not occur. Therefore, the captive donor population is essential to the recovery of the species by supplying surplus ferrets for reintroduction.

The "experimental population" designation means the reintroduced ferret population will be treated as a threatened species rather than an endangered species. Under section 4(d) of the Act, this designation enables the Service to develop special regulations for management of the population that are less restrictive than the mandatory prohibitions covering endangered species. Thus, the experimental designation allows the management flexibility needed to ensure that reintroduction is compatible with current or planned human activities in the Reintroduction Area and to permit biological manipulation of the population for recovery purposes.

Experimental populations can be determined as either "essential" or "nonessential." An essential experimental population means a population "whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild" (50 CFR 17.80, Subpart H—Experimental Populations). All other experimental populations are treated as "nonessential." For purposes of section 7(a)(2) of the Act, nonessential experimental populations are treated as though they are proposed for listing, except on National Wildlife Refuge System and National Park System lands, where they are treated as a species listed as threatened under the Act.

The captive black-footed ferret population is the primary species population. It has been protected against the threat of extinction from a single catastrophic event by splitting the captive population into seven widely separated subpopulations.

The primary repository of genetic diversity for the species is the approximately 240 adult breeders in the captive population. Animals selected for reintroduction purposes will be as genetically redundant as possible with the captive population. Hence, any loss of reintroduced animals in the Montana experimental population would not significantly impact species survival or the goal of preserving maximum genetic diversity in the species.

All animals lost during the reintroduction attempt can be readily replaced through captive breeding, as demonstrated by the rapid increase in the captive population over the past 6 years. Based on current population dynamics, 100 juvenile ferrets will likely be produced each year in excess of numbers needed to maintain 240 breeding adults in captivity.

The concept of experimental populations and classifying them as nonessential was amended into the Act by Congress in 1982 to make it easier to reintroduce individuals of an endangered or threatened species in areas where there was local opposition to the reintroduction. This is discussed in greater detail later in this document under Issue 1.

The Experimental Population Area does not currently contain ferrets; the proposed nonessential experimental population will include all ferrets taken from captivity and released into the Experimental Population Area and all their progeny.

This reintroduction effort will be the Service's second attempt to reintroduce the black-footed ferret into the wild. The biological and logistical problems of reintroducing and recovering this species that remain to be addressed are significant. However, reintroduction attempts must continue or the captive population may become overly adapted to captivity. In the long run, exclusive captivity likely would increase the risk of ferrets losing important wild survival instincts and reduce the likelihood of successful reintroduction and ultimately recovery of the species.

Virtually all of the habitat in the Conata Basin/Badlands Reintroduction Area is federally owned. The nonessential experimental population designation will facilitate re-establishment of the species in the wild by easing adjacent landowner concerns about protective measures for

reintroduced ferrets that might otherwise be taken. This designation will relax the regulations that protect each individual ferret of the reintroduced population, while promoting the conservation of the reintroduced population as a whole. The nonessential designation provides a more flexible management framework for protecting and recovering black-footed ferrets, such that adjacent private landowners may continue their current lifestyles.

First attempts to reintroduce the black-footed ferret into the wild (including the Shirley Basin and South Dakota reintroductions) will place great emphasis on developing and improving reintroduction techniques. This applied research will lay the groundwork for a general reintroduction and management protocol for re-establishing black-footed ferrets in other parts of their historical range, which the Service expects to develop after initial reintroductions have occurred.

As ferret reintroduction efforts progress, the Service will evaluate each potential site to determine whether released ferret populations should be proposed as nonessential experimental or essential experimental, or should retain their endangered status. The Service believes that at least 10 or more wild populations are needed to ensure the immediate survival and downlisting of this species to threatened status (U.S. Fish and Wildlife Service 1988).

Location of Reintroduced Population

Under Section 10(j) of the Act, an experimental population must be wholly separate geographically from nonexperimental populations of the same species. Since the last known member of the original Meeteetse black-footed ferret population was captured for inclusion in the captive population in 1987, no ferrets other than those released in Wyoming in 1991, 1992, and 1993 have been confirmed anywhere in the wild. There is a chance that black-footed ferrets still exist outside the Shirley Basin site. However, survey work for black-footed ferrets in the Experimental Population Area has been extensive because of the interspersed of Federal and tribal lands, and no ferrets have been found. Since 1982, the USFS has conducted over 760 surveys for black-footed ferrets on more than 20,200 hectares (50,000 acres) of prairie dog colonies in the Experimental Population Area. This included prairie dog complexes on both Federal and neighboring private lands when the complex covered both land ownerships.

The NPS has conducted 24 black-footed ferret surveys on over 800

hectares (2,000 acres) of prairie dog colonies since 1988. During the period 1985-1989, the Pine Ridge Indian Reservation undertook a \$6.2 million prairie dog control program and treated over 121,000 hectares (300,000 acres) of prairie dog habitat on the reservation. All treated acres were surveyed prior to treatment and part of this acreage lies within the Experimental Population Area.

In addition to actual black-footed ferret surveys, numerous hours have been spent on prairie dog colonies in the Experimental Population Area conducting a variety of research and land management practices. No black-footed ferrets or black-footed ferret sign was observed during these activities. Based on these data, the Service believes that the reintroduced population will not overlap with any wild population of the species. Consequently, barring strong evidence to the contrary (such as a wild black-footed ferret being found in the Experimental Population Area before the first breeding season), with this final rulemaking, the Service administratively determines that wild black-footed ferrets no longer exist in the Experimental Population Area prior to this release.

The Conata Basin/Badlands Reintroduction Area lies on USFS and NPS land in three irregularly shaped areas. The Conata Basin/Badlands Reintroduction Area lies entirely in eastern Pennington County. The Experimental Population Area extends southward into Shannon County and eastward into Jackson County.

The Conata Basin/Badlands Experimental Population Area is that area bounded on the north by Interstate Highway 90 (I-90) beginning where it crosses the Cheyenne River; then east following I-90 to State Highway 73; then south along Highway 73 to Highway 44; then west along Highway 44 to where it meets Bureau of Indian Affairs (BIA) Highway 2 and continues west along BIA Highway 2 to BIA Highway 41; then north along BIA Highway 41 to the Cheyenne River; and then northeast along the Cheyenne River to the point of origin at I-90. While none of these features absolutely preclude black-footed ferret movement, the deterrent they represent, coupled with the distance from the Reintroduction Area, makes it unlikely that a black-footed ferret would emigrate outside the Experimental Population Area. Sufficient black-footed ferret surveys have been conducted in the Experimental Population Area over the last 10 years to indicate that no wild

black-footed ferret population exists in the area.

The Conata Basin/Badlands Reintroduction Area will serve as the core recovery area. Prior to the first breeding season following the first releases, all marked black-footed ferrets in the wild in the Experimental Population Area will comprise the nonessential experimental population. During and after the first breeding season, all black-footed ferrets in the wild located east of the Cheyenne River and Bureau of Indian Affairs (BIA) Highway 41, south of I-90, west of State Highway 73, and north of State Highway 44 and BIA Highway 2 in Pennington, Shannon, and Jackson Counties, South Dakota, will comprise the nonessential experimental population. Reintroduced black-footed ferrets are expected to remain in the Conata Basin/Badlands Reintroduction Area because of the prime prairie dog populations present and the limited home range of black-footed ferrets. In the unlikely event that a black-footed ferret leaves the Conata Basin/Badlands Reintroduction Area but stays within the boundaries of the Experimental Population Area, the Service will have the authority to capture the emigrant and place it back into the Reintroduction Area, translocate it to another reintroduction site, or place it in captivity. However, black-footed ferrets on Federal lands in the Experimental Population Area generally will not be removed. If a black-footed ferret is found on private land outside the Reintroduction Area but within the Experimental Population Area, the landowner will be consulted and the black-footed ferret will be removed if the landowner so requests.

All black-footed ferrets released in the Reintroduction Area will be appropriately marked (e.g., with PIT tags, non-toxic paints, or radio collars). In the unlikely event that unmarked black-footed ferrets are found in the Experimental Population Area before the first breeding season following the first fall release, a concerted effort will be initiated to determine the location of the source population. This search will ascertain whether a wild population exists and determine the need for appropriate cooperative conservation actions.

A black-footed ferret occurring outside the Experimental Population Area in South Dakota would initially be considered as endangered but may be captured for genetic testing. If an animal is genetically determined to be from the experimental population, it may be returned to the Reintroduction Area, held in captivity, or released at another reintroduction site.

If an animal is determined to be genetically unrelated to the experimental population, then, under an existing contingency plan, up to nine black-footed ferrets may be taken for use in the captive-breeding program. If a landowner outside the Experimental Population Area wishes to retain black-footed ferrets on his property, a conservation agreement or easement may be arranged with the landowner.

Management

The Conata Basin/Badlands reintroduction will be undertaken by the Service, the USFS, and the NPS in accordance with the Management Plan (USFWS, USFS, and NPS 1993). This Management Plan will be updated as necessary. General reintroduction protocols were discussed under "Background." Additional considerations pertinent to reintroduction are discussed here.

1. **Monitoring:** Various monitoring efforts are planned over the first 5 years. Prairie dog numbers and distribution will be monitored annually. Monitoring for sylvatic plague will be conducted. Presence of canine distemper will be monitored prior to and during reintroduction. Reintroduced black-footed ferrets and their offspring will be monitored every year using spotlight surveys and/or snow tracking surveys done on foot. Some black-footed ferrets may be radio-collared and all will be marked. Assuming some black-footed ferrets survive the winter and enter the courtship and breeding season the next year, monitoring of breeding success and recruitment will take priority. Black-footed ferret behavior will be monitored throughout the duration of the reintroduction effort.

The Service will request that the USFS's and the NPS's Reintroduction Area supervisor/manager assign a primary black-footed ferret program contact for agencies, private landowners, and public users in the affected area, who will follow up on reports of injured or killed black-footed ferrets and immediately notify the U.S. Fish and Wildlife Field Supervisor, Ecological Services, Pierre, South Dakota, (605) 224-8693. The Field Supervisor will notify the Service's Law Enforcement Division. Discussions and actions to follow up these notifications and collection and determination of the disposition of any live or dead specimens will follow as soon as possible.

The Service will assist in ensuring that governmental agencies and the public are informed about the presence of black-footed ferrets in the affected area via public information, education,

and media programs. These information programs also will address the precautions and care that should be taken in handling sick and injured black-footed ferrets. This will enhance effective treatment and care in handling specimens and, when dead black-footed ferrets are located, will ensure proper preservation of black-footed ferret remains. The finder or investigator will be requested to ensure that evidence pertinent to the specimen is not unnecessarily disturbed.

The Service will require that persons locating dead, injured, or sick black-footed ferrets immediately notify the Field Supervisor, Fish and Wildlife Service, Ecological Services, Pierre, South Dakota.

2. Disease Considerations:

Reintroduction will be re-evaluated if a significant number of cases of canine distemper are documented in any wild mammal within 6 months prior to the scheduled reintroduction. Samples from coyotes and badgers will be obtained prior to the reintroduction to determine if canine distemper exists in the Reintroduction Area. Visitors and biologists will be discouraged from bringing dogs into the Reintroduction Area. Residents and hunters will be encouraged to report sick wildlife. Efforts are continuing to develop an effective canine distemper vaccine for black-footed ferrets.

Although there is no history of sylvatic plague in the area, sampling for sylvatic plague will occur on a regular basis prior to and during the reintroduction effort.

3. *Genetic Considerations:* While the ultimate genetic goal of the reintroduction program is to establish wild reintroduced populations that embody the maximum level of genetic diversity available from the captive population, individuals used for reintroduction will be chosen so that the level of genetic diversity and demographic stability (e.g., stable age and sex structure) of the captive population is not compromised (reduced) by their removal.

4. *Prairie Dog Management:* Prairie dog management in the Reintroduction Area will be in accordance with the USFS's Prairie Dog Management Plan on USFS land and according to the NPS's Resource Management Plan on NPS land. While both plans may be subject to change, the proposed black-footed ferret reintroduction is based on current versions of these plans, and no change in present plans is sought because of black-footed ferret reintroduction. Prairie dog management on private land is at the discretion of the landowners.

5. *Mortality:* Though efforts will be made to reduce mortality, significant mortality will inevitably occur as captive-raised animals adapt to the wild. Natural mortality from predators, fluctuating food availability, disease, hunting inexperience, etc., will be reduced through predator and prairie dog management, vaccination, supplemental feeding, and pre-release conditioning. Human-caused mortality will be reduced through information and education efforts.

A low level of mortality from "incidental take" (defined by the Act as take that is incidental to, but not the purpose of, an otherwise lawful activity) is expected during the reintroduction program as a result of designing the black-footed ferret reintroduction program to work within the context of traditional land uses in the Reintroduction Area.

Incidental take (e.g., ferret injury or mortality) will be required to be reported immediately to the Service. The Service will investigate each case. If it is determined that a ferret injury or mortality was unavoidable, unintentional, and did not result from negligent conduct lacking reasonable due care, such conduct will not be considered "knowing take" for the purpose of this regulation. Therefore, the Service will not take legal action for such conduct. However, knowing take will be referred to the appropriate authorities for prosecution.

The biological opinion prepared on the reintroduction anticipates an incidental take level of 12 percent per year. If this level of incidental take is exceeded at any time within any year, the Service, in cooperation with the USFS and the NPS, will conduct an evaluation of incidental take and cooperatively develop and implement with the landowners and land users measures to reduce incidental take.

Even if all released animals were to succumb to natural and human-caused mortality factors, this would not threaten the continued existence of the species, because the captive population is the species' primary population and could readily replace any animals lost in the reintroduction effort. This is consistent with the designation of the reintroduced population as a nonessential experimental population. The choice for wildlife managers is either to risk excess captive black-footed ferrets in reintroduction efforts in order to re-establish the species in the wild, or to keep all black-footed ferrets in relative safety in captivity. The Service believes the long-term benefits to the species of establishing individual wild ferret populations outweighs the

relatively minor risks associated with losses of surplus ferrets during reintroduction efforts.

6. *Special Handling:* Under the special regulation [promulgated under authority of Section 4(d) of the Act] that will accompany the experimental population designation, Service employees and agents will be authorized to handle black-footed ferrets for scientific purposes; relocate black-footed ferrets to avoid conflict with human activities; relocate ferrets within the Experimental Population Area to improve ferret survival and recovery prospects; relocate black-footed ferrets to future reintroduction sites; aid animals that are sick, injured, or orphaned; and salvage and dispose of dead ferrets. If a ferret is determined to be unfit to remain in the wild, it will be placed in captivity. The Service will determine the disposition of sick, injured, orphaned, or dead black-footed ferrets.

7. *Coordination with Landowners and Land Management Agencies:* The South Dakota black-footed ferret reintroduction program was discussed with potentially affected State and Federal agencies in the proposed Reintroduction Area. An effort to identify issues and concerns associated with reintroduction into the Conata Basin/Badlands Area was conducted through a Coordinated Resource Management process. A Local Level Committee (LLC) was selected consisting of Federal Agencies, State agencies, environmental interests, grazing and land-use interests, and local landowners to discuss concerns about ferret reintroduction over a period of 16 months.

The LLC did not reach a consensus on a plan for black-footed ferret restoration. However, the issues raised during the six LLC meetings provided valuable input to the Federal agencies responsible for developing the Environmental Impact Statement (EIS). The LLC members also provided their individual comments to the Governor of South Dakota, who indicated in letters to the Secretaries of Agriculture and Interior his willingness to support a black-footed ferret restoration program, provided property rights of private individuals could be protected.

8. *Potential for Conflict with Grazing and Recreational Activities:* USFS lands in the Conata Basin/Badlands Reintroduction Area are included in grazing allotments. Conflicts between grazing and black-footed ferret management are not anticipated on USFS lands as current USFS prairie dog management plans have assigned reduced Animal Unit Months to areas

that are designated untreated areas for prairie dogs. No additional grazing restrictions will be placed on USFS lands with grazing allotments in the Conata Basin/Badlands Reintroduction Area as a result of black-footed ferret reintroduction. No commercial grazing occurs on NPS land.

No restrictions in addition to existing requirements will be placed on landowners regarding prairie dog control on private lands in the Experimental Population Area.

Recreational activities currently practiced in the Conata Basin/Badlands Reintroduction Area (e.g., antelope hunting, prairie dog shooting, rabbit hunting using greyhound dogs, furbearer or predator trapping, and off-road vehicle recreation) are either unlikely to impact black-footed ferrets or, if negative impacts are demonstrated, will be managed to avoid or minimize such impacts.

9. Protection of Black-Footed Ferrets: Released black-footed ferrets will initially need protection from natural sources of mortality (predators, disease, inadequate prey, etc.) and from human-caused sources of mortality. Natural mortality will be reduced through pre-release conditioning, vaccination, predator control, management of prairie dog populations, etc. Human-caused mortality will be minimized by placing black-footed ferrets in an area with low human population density; by working with landowners, Federal land managers, and recreationists to develop means for conducting existing and planned activities in a manner compatible with ferret recovery; and by conferring with developers on proposed actions and providing recommendations that will reduce likely adverse impacts to ferrets.

A final biological opinion was prepared on this action to reintroduce black-footed ferrets into the Experimental Population Area; it concluded that this action is not likely to jeopardize any listed species.

10. Public Awareness and Cooperation: Extensive information sharing about the program and the species, via educational efforts targeted toward the public in the region and nationally, will enhance public awareness of this species and this reintroduction.

11. Overall: The designation of the Conata Basin/Badlands population as a nonessential experimental population and its associated management flexibility should encourage local acceptance of and cooperation with the reintroduction effort. The Service considers the nonessential experimental population designation, the

accompanying special rule, and the Management Plan necessary to obtain the cooperation of landowners, agencies, citizens, grazing interests, and recreational interests in the area.

12. Effective Date: The provisions of 5 U.S.C. 533 provide that at least 30 days shall be allowed before a rule becomes effective unless an agency has good reason to make it effective sooner. It is essential to the success of the reintroduction effort that releases commence in the fall of the year, when wild young ferrets typically would become independent of natal care and disperse. The Service plans to begin initial ferret releases in the South Dakota Reintroduction Area in early September 1994. Therefore, this rule is effective immediately upon publication in the Federal Register.

Summary of Comments and Recommendations

In the May 19, 1993, proposed rule and associated notifications, all interested parties were invited to submit comments or recommendations concerning any aspect of the proposed rule that might contribute to the development of a final rule. On May 21, 1993, the Service mailed copies of the proposed rule, the Draft Environmental Impact Statement (DEIS), and a draft management plan to appropriate Federal Agencies, tribal governments, State agencies, county governments, business and conservation organizations, and other interested parties. Approximately 300 of these packets were mailed.

Legal notices inviting public comment were published in the Rapid City Journal on June 5, 1993, and the Sioux Falls Argus Leader on June 4, 1993. In early May and again in early June, news releases were mailed to over 200 media outlets in South Dakota, including newspapers, television stations, and radio stations. Two public hearings on the proposed rule were held. On June 9, 1993, a hearing was held in Pierre, South Dakota, and on June 10, 1993, a hearing was held in Rapid City, South Dakota.

The Service received 54 letters and 28 oral comments on the entire proposed rule and DEIS package. Only 13 of the letters were determined to be direct comments on the proposed rule.

Most environmental groups and some individuals pointed out the same concern—that is, that the designation of the captive population as the essential one is incorrect and that some portion of the Reintroduction Area should be designated as an essential population. One commenter supported the nonessential designation.

Two different commenters made numerous comments on the proposed rule. They felt that the experimental population option was used too broadly; it should be used on private land only and not on public land. They felt no evidence was presented that section 7 and section 9 of the Act were impediments to black-footed ferret releases. They felt that the proposed rule could be construed to mean that the Service would invite or condone indiscriminate killing of black-footed ferrets and wanted no hunting, trapping, or off-road vehicle (ORV) use in the Reintroduction Area.

One commenter objected to provisions that would allow landowners to request removal of black-footed ferrets without a clear demonstration of harm.

One commenter questioned the need for greater management flexibility because they felt that the return of the black-footed ferret does not present any risk to land use. This commenter also saw no need to reduce the requirements of section 7 and section 9 of the Act from the proposal, thought the proposed rule was biased toward protecting human activities and that management priority should be placed on protecting black-footed ferrets, and thought that captive breeding efforts should be reduced in favor of placing priority on wild populations.

Two commenters questioned if a list of parameters had been developed that would move the program from a nonessential to essential reintroduction. They also were concerned that the South Dakota reintroduction was remarkably similar to the Montana reintroduction and suggested that a national plan be developed.

One commenter thought it was unclear whether the incidental take allowance by nonagency persons within the Experimental Population Area includes take occurring in the Reintroduction Area.

Comments of a similar nature or point are grouped into a number of general issues. These issues, and the Service's response to each, are discussed below:

Issue 1: Should the reintroduced population be designated as an essential experimental population as opposed to a nonessential experimental population?

Response: The Service's rationale for designating the South Dakota ferret reintroduction as a nonessential experimental population was explained above under "Status of Reintroduced Population." Establishment of a wild population in the Experimental Population Area is not essential to the continued existence of the species in the wild. The donor captive population,

which is the population whose loss would appreciably affect the likelihood of survival of the species in the wild, is secure and other reintroduction sites are being identified and readied.

The captive population is the primary species population. It has been protected against the threat of extinction from a single catastrophic event through splitting the captive population into seven widely separated subpopulations. Hence, loss of the experimental population would not threaten the species' survival.

The primary repository of genetic diversity for the species is the 240 adult breeders in the captive population. Animals selected for reintroduction purposes will be as genetically redundant as possible with the captive population; hence, any loss of reintroduced animals in this experimental population will not significantly impact the goal of preserving maximum genetic diversity in the species.

All animals lost during the reintroduction attempt can readily be replaced through captive breeding, as demonstrated by the rapid increase in the captive population over the past 6 years. Based on current population dynamics, 100 juvenile ferrets will likely be produced each year in excess of numbers needed to maintain 240 breeding adults in captivity.

There are no known populations of ferrets in the wild except for the nonessential experimental population reintroduced into the Shirley Basin area in Wyoming. The only other ferrets known to exist are in captive breeding facilities. Because the breeding program has been so successful, there are more ferrets in captivity than are needed for the breeding program or for ensuring the survival of the species. Ferrets that are the subject of this rule are surplus animals that the Service has determined are not needed for these purposes. Having a sufficient number of black-footed ferrets in the breeding program means that the Service will be able to continue to produce surplus ferrets for reintroductions and thus bring about the survival of the species in the wild.

Consequently, the captive breeding population is the population that is essential to the survival of the species in the wild. The nonessential designation is based on the Service's conclusion that those ferrets to be removed from captivity and reintroduced into South Dakota are not needed for the survival of the species in the wild. If the released animals are lost, they can be replaced with other black-footed ferrets produced in captivity.

The Service's position is supported by the preamble to the final rule for establishing experimental populations published in the **Federal Register** on August 27, 1984 (49 FR 33885). It explains that the organisms that will be reclassified as experimental are those which are to be removed from an existent source or donor population. Additionally, one commenter on the proposed rule that preceded the final rule on experimental populations stated that no species classified as endangered could have populations biologically nonessential to their survival. In its final rule, the Service disagreed with this comment and stated " * * * there can be situations where the status of the extant population is such that individuals can be removed to provide a donor source for reintroduction without creating adverse impacts upon the parent population. This is especially true if the captive propagation efforts are providing individuals for release into the wild."

Furthermore, the Service referred to the Conference Report, which is especially significant because the definition of "essential population" in the experimental population final rule is virtually identical to the language in the Conference Report. Congress explained, " * * * (T)he level of reduction necessary to constitute 'essentiality' is expected to vary among listed species and, in most cases, experimental populations will not be essential" [H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess., 34 (1982)].

The Senate report explains that the special regulations designating experimental populations are to be designed to address the "particular needs" of each experimental population and that the Secretary is "granted broad flexibility" in promulgating the special regulations [S. Rep. No. 97-418, 97th Cong., 2d Sess., 8 (1982)].

Issue 2: Should the reintroduced population be fully endangered rather than experimental?

Response: The Service has not decided that black-footed ferrets in captivity are the only ferrets that will ever retain endangered status under the Act. It is important to recognize that one of the reasons Congress amended the Act in 1982 was to provide for experimental populations. The House Report is instructive on this point. It states that reintroduction efforts had encountered strong opposition from the states and areas where species were to be reintroduced. Opponents were concerned that, if reintroduced species were fully protected under the Act, then conflicts with existing uses would result and new development would be

curtailed. Congress amended the Act to mitigate and alleviate such fears.

Because of the flexibility provided by Congress as discussed under Issue 1, the Service maintains that it has the authority under the Act to designate this population as experimental if such action will further the conservation of the species, and if the decision is based on the best scientific and commercial data available.

Issue 3: Should the proposed reintroduction provide greater protection for black-footed ferrets from impacts such as grazing, trapping, prairie dog hunting, and oil and gas development than is proposed?

Response: The Service, working with the NPS and the USFS, developed the Management Plan that will guide how these types of activities are carried out within the Reintroduction Area. The Service believes the Management Plan provides adequate protection from these activities. Both the NPS and the USFS have authority to restrict access if additional protection proves necessary.

Issue 4: Should black-footed ferrets be removed from private land in the Experimental Population Area without clear demonstration of harm?

Response: The Reintroduction Area has been identified as an adequate area for a black-footed ferret population to survive. The surrounding Experimental Population Area has been identified as an area that acts as a buffer zone. The purpose of the nonessential experimental population designation was to alleviate local landowner concerns over restrictions that would otherwise occur with the presence of black-footed ferrets. Removal of a black-footed ferret at the landowner's request will allow for the relocation of the animal into high quality habitat areas in the Reintroduction Area, and also would keep released ferrets concentrated in the Reintroduction Area, which may aid in the recovery of the species. The Service does not view the removal of black-footed ferrets from private lands as detrimental to the reintroduction effort.

Issue 5: Is there a need for less management flexibility than that described in the proposed rule (e.g., no reduction in section 7 and section 9 responsibilities)?

Response: Designation of an experimental population provides flexibility in management outside the Reintroduction Area as well as within the Reintroduction Area. While the experimental designation will help relieve some restrictions on landowners relating to the presence of black-footed ferrets, the designation also is important to biologists by allowing them to

directly manage released ferrets (e.g., by capture and relocation), which will benefit the reintroduction effort and the species. The nonessential experimental designation does change the status of black-footed ferrets with respect to section 7 and section 9 of the Act. Nevertheless, ferrets under this designation still retain significant protections under the Act, and the Service does not believe an experimental designation will be detrimental to the establishment of a sustained black-footed ferret population.

Issue 6: Is there a list of parameters that would change the status of black-footed ferrets from nonessential to essential? Should a national plan be developed?

Response: Once this final rule goes into effect, changing the nonessential experimental designation of the South Dakota ferret population would require a new rulemaking process, which would include a proposed rule, a public comment period, public meetings, National Environmental Policy Act compliance, and other documentation before a final rule to change the designation could be published. Under the experimental population regulations (50 CFR 17 Subpart H), any rule designating an experimental population must provide " * * * a process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species." The 5-year evaluation noted in section 17.84(g)(10) of the proposed rule is intended to be a milestone in this required periodic review and evaluation process, and will be a review of the biological success of the reintroduction effort. If determined to be less than successful, the Service, USFS, and NPS will modify the reintroduction protocol and/or the strategies within the Management Plan to improve ferret survival and/or recruitment, with the involvement of affected landowners and land managers. If the experiment is extremely unsuccessful, the Service, USFS, and NPS may consider a temporary hold on releasing ferrets into the Reintroduction Area until better release or management techniques are developed. The 5-year evaluation will not include an evaluation to determine whether the population should be reclassified.

The Service does not foresee any likely situation, except for eventual delisting of the species, that would call for altering the nonessential experimental status of the South Dakota ferret population.

However, the Service is working toward development of a national strategy that will address the goals and

objectives outlined in the Black-footed Ferret Recovery Plan developed in 1978 and revised in 1988.

Issue 7: Is clarification needed on whether incidental take allowed under the special rule would include take occurring in the Reintroduction Area?

Response: The take statement which appears in Section 17.84(g)(5) applies to the Experimental Population Area as defined by the rule; this includes the Reintroduction Area. The Reintroduction Area is entirely on Federal land, and Federal land management agencies within the area have authority over land-use practices on their lands and have agreed to abide by the Management Plan. Thus, incidental take allowed by the special rule will apply to the Reintroduction Area but will be regulated by adequate Federal authority.

Issue 8: Were the boundaries of the Experimental Population Area appropriate—that is, why was a larger area not considered for the Reintroduction Area?

Response: Black-footed ferrets were historically found throughout western South Dakota. The Experimental Population Area boundaries were drawn to include all potential black-footed ferret habitat (prairie dog colonies) within the Conata Basin/Badlands Prairie Dog Complex—that is, prairie dog colonies within 7 kilometers of another colony (and that were not being treated with rodenticides). Black-footed ferrets traveling beyond the Reintroduction Area will be exposed to areas of less suitable habitat. The proposed Reintroduction Area, according to available modeling information, contains sufficient acreage and densities of prairie dogs to support a viable population of black-footed ferrets for a 100-year period.

Issue 9: How does the Service plan to address impacts on long-term black-footed ferret viability?

Response: The Service has addressed the long-term viability of ferrets in the wild through recovery goals and objectives described in the 1988 revised Black-footed Ferret Recovery Plan. This plan identifies objectives that must be met to downlist the species to threatened, which in turn would ensure the long-term viability of the species in the wild. The revised recovery plan reflects current information and recovery objectives, and outlines steps for recovery that, when accomplished, will provide for viable black-footed ferret populations in captivity and within its historical range. These objectives include:

(1) Increasing the captive population of black-footed ferrets to a census size

of 200 breeding adults by 1991 (this goal was subsequently changed to 240 and has been achieved);

(2) Establishing a pre-breeding census population of 1,500 free ranging black-footed ferret breeding adults in 10 or more populations with no fewer than 30 breeding adults in any population by the year 2010; and

(3) Encouraging the widest possible distribution of reintroduced black-footed ferret populations.

It is the Service's opinion that the Recovery Plan will continue to be revised to reflect future requirements and direction to ensure recovery of the black-footed ferret in the wild. In addition, the Service plans to develop a national strategy for implementing the ferret reintroduction program, based in part on initial reintroduction efforts. This strategy would outline the specific methods and means necessary to achieve recovery objectives cited in the Recovery Plan.

National Environmental Policy Act

A final EIS, as defined under the authority of the National Environmental Policy Act of 1969, has been prepared and is available from the Service offices identified in the ADDRESSES section.

Required Determinations

This rule was not subject to Office of Management and Budget review under Executive Order 12866. The rule will not have a significant economic effect on a substantial number of small entities as described in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The rule does not contain any information collection or recordkeeping requirements as defined in the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Effective Date

The provisions of 5 U.S.C. provide for no less than 30 days for a rule to become effective unless an agency, for good reason, makes it sooner. Due to the need to release black-footed ferrets to the wild immediately in order to allow them as much time as possible to become established before winter sets in, this final rule is effective immediately.

References Cited

- Anderson, E., S.C. Forrest, T.W. Clark, and L. Richardson. 1986. Paleobiology, biogeography, and systematics of the black-footed ferret (*Mustela nigripes*) (Audubon and Bachman 1851). Great Basin Nat. Mem. 8:11-62.
- Anderson, S. 1972. Mammals of Chihuahua—taxonomy and distribution. Bull. Amer. Mus. Nat. Hist. 148(2):280-281.

Biggins, D., B. Miller, L. Hanebury, B. Oakleaf, A. Farmer, R. Crete, and A. Dood. 1991. A system for evaluating black-footed ferret habitat. Report prepared for the Black-Footed Ferret ICC. U.S. Fish and Wildlife Service, 1300 Blue Spruce Drive, Fort Collins, CO. 58 pp.

Forrest, S.C., T.W. Clark, L. Richardson, and T.M. Campbell III. 1985. Black-footed ferret habitat: some management and reintroduction considerations. Wyoming BLM, Wildl. Tech. Bull. No. 2. 49 pp.

Henderson, F.R., P.F. Springer, and R. Adrian. 1969. The black-footed ferret in South Dakota. South Dakota Department of Game, Fish and Parks, Technical Bulletin 4:1-36.

Messing, H.J. 1986. A late Pleistocene-Holocene fauna of Chihuahua, Mexico. The Southwestern Naturalist 31(3):277-288.

U.S. Fish and Wildlife Service. 1988. Revised black-footed ferret recovery plan. U.S. Fish and Wildlife Service, Denver, Colorado. 154 pages.

U.S. Fish and Wildlife Service, U.S. Forest Service, and National Park Service. 1993. Draft cooperative management plan for black-footed ferrets, Conata Basin/Badlands Complex, South Dakota. U.S. Fish and Wildlife Service, Pierre, South Dakota. 46 pp.

Authors

The principal authors of this rule are Douglas Searls, South Dakota Field Office and Ronald Naten, Regional Office (see FOR FURTHER INFORMATION CONTACT section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Regulations Promulgation

Part 17, subchapter B of chapter I, title 50 of the U.S. Code of Federal Regulations, is amended as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500, unless otherwise noted.

2. Section 17.11(h) is amended by revising the existing two entries for the "Ferret, black-footed" under "MAMMALS" to read as shown below:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
MAMMALS							
Ferret, black-footed	<i>Mustela nigripes</i>	Western U.S.A., Western Canada.	Entire, except where listed as an experimental population below.	E	1, 3, 433, 543	NA	NA
Do	do	do	U.S.A. (specified portions of Wyoming and South Dakota).	XN	433, 543	NA	17.84(g)

3. Section 17.84 is amended by revising the text of paragraph (g) to read as follows:

§ 17.84 Special rules—vertebrates

* * * * *

(g) Black-footed ferret (*Mustela nigripes*)

(1) The black-footed ferret populations identified in paragraphs (g)(9)(i) and (g)(9)(ii) of this section are nonessential experimental populations. Each of these populations will be managed in accordance with their respective management plans.

(2) No person may take this species in the wild in the experimental population areas except as provided in paragraphs (g)(3), (4), (5), and (10) of this section.

(3) Any person with a valid permit issued by the U.S. Fish and Wildlife Service (Service) under § 17.32 may take black-footed ferrets in the wild in the experimental population areas.

(4) Any employee or agent of the Service or appropriate State wildlife agency, who is designated for such purposes, when acting in the course of

official duties, may take a black-footed ferret from the wild in the experimental population areas if such action is necessary:

- (i) For scientific purposes;
- (ii) To relocate a ferret to avoid conflict with human activities;
- (iii) To relocate a ferret that has moved outside the Reintroduction Area when removal is necessary to protect the ferret, or is requested by an affected landowner or land manager, or whose removal is requested pursuant to paragraph (g)(12) of this section;
- (iv) To relocate ferrets within the experimental population areas to improve ferret survival and recovery prospects;
- (v) To relocate ferrets from the experimental population areas into other ferret reintroduction areas or captivity;

(vi) To aid a sick, injured, or orphaned animal; or

(vii) To salvage a dead specimen for scientific purposes.

(5) A person may take a ferret in the wild within the experimental

population areas provided such take is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity and if such ferret injury or mortality was unavoidable, unintentional, and did not result from negligent conduct. Such conduct will not be considered "knowing take" for purposes of this regulation, and the Service will not take legal action for such conduct. However, knowing take will be referred to the appropriate authorities for prosecution.

(6) Any taking pursuant to paragraphs (g)(3), (4) (vi) and (vii), and (5) of this section must be reported immediately to the appropriate Service Field Supervisor, who will determine the disposition of any live or dead specimens.

(i) Such taking in the Shirley Basin/Medicine Bow experimental population area must be reported to the Field Supervisor, Ecological Services, Fish and Wildlife Service, Cheyenne, Wyoming (telephone: 307/772-2374).

(ii) Such taking in the Conata Basin/Badlands experimental population area must be reported to the Field Supervisor, Ecological Services, Fish and Wildlife Service, Pierre, South Dakota (telephone: 605/224-8693).

(7) No person shall possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever any ferret or part thereof from the experimental populations taken in violation of these regulations or in violation of applicable State fish and wildlife laws or regulations or the Endangered Species Act.

(8) It is unlawful for any person to attempt to commit, solicit another to commit, or cause to be committed any offense defined in paragraphs (g) (2) and (7) of this section.

(9) The sites for reintroduction of black-footed ferrets are within the historical range of the species.

(i) The Shirley Basin/Medicine Bow Management Area is shown on the attached map and will be considered the core recovery area for the species in southeastern Wyoming. The boundaries of the nonessential experimental population will be that part of Wyoming south and east of the North Platte River within Natrona, Carbon, and Albany Counties (see Wyoming map). All marked ferrets found in the wild within these boundaries prior to the first breeding season following the first year of releases will constitute the nonessential experimental population during this period. All ferrets found in the wild within these boundaries during and after the first breeding season following the first year of releases will comprise the nonessential experimental population thereafter.

(ii) The Conata Basin/Badlands Reintroduction Area is shown on the attached map for South Dakota and will be considered the core recovery area for

this species in southwestern South Dakota. The boundaries of the nonessential experimental population area will be north of State Highway 44 and BIA Highway 2 east of the Cheyenne River and BIA Highway 41, south of I-90, and west of State Highway 73 within Pennington, Shannon, and Jackson Counties, South Dakota. Any black-footed ferret found in the wild within these boundaries will be considered part of the nonessential experimental population after the first breeding season following the first year of releases of black-footed ferrets in the Reintroduction Area. A black-footed ferret occurring outside the experimental population area in South Dakota would initially be considered as endangered but may be captured for genetic testing. Disposition of the captured animal may take the following actions if necessary:

(A) If an animal is genetically determined to have originated from the experimental population, it may be returned to the Reintroduction Area or to a captive facility.

(B) If an animal is determined to be genetically unrelated to the experimental population, then under an existing contingency plan, up to nine black-footed ferrets may be taken for use in the captive-breeding program. If a landowner outside the experimental population area wishes to retain black-footed ferrets on his property, a conservation agreement or easement may be arranged with the landowner.

(10) The reintroduced populations will be continually monitored during the life of the project, including the use of radio-telemetry and other remote sensing devices, as appropriate. All released animals will be vaccinated against diseases prevalent in mustelids, as appropriate, prior to release. Any animal which is sick, injured, or

otherwise in need of special care may be captured by authorized personnel of the Service or the Department or their agents and given appropriate care. Such an animal may be released back to its respective reintroduction area or another authorized site as soon as possible, unless physical or behavioral problems make it necessary to return the animal to captivity.

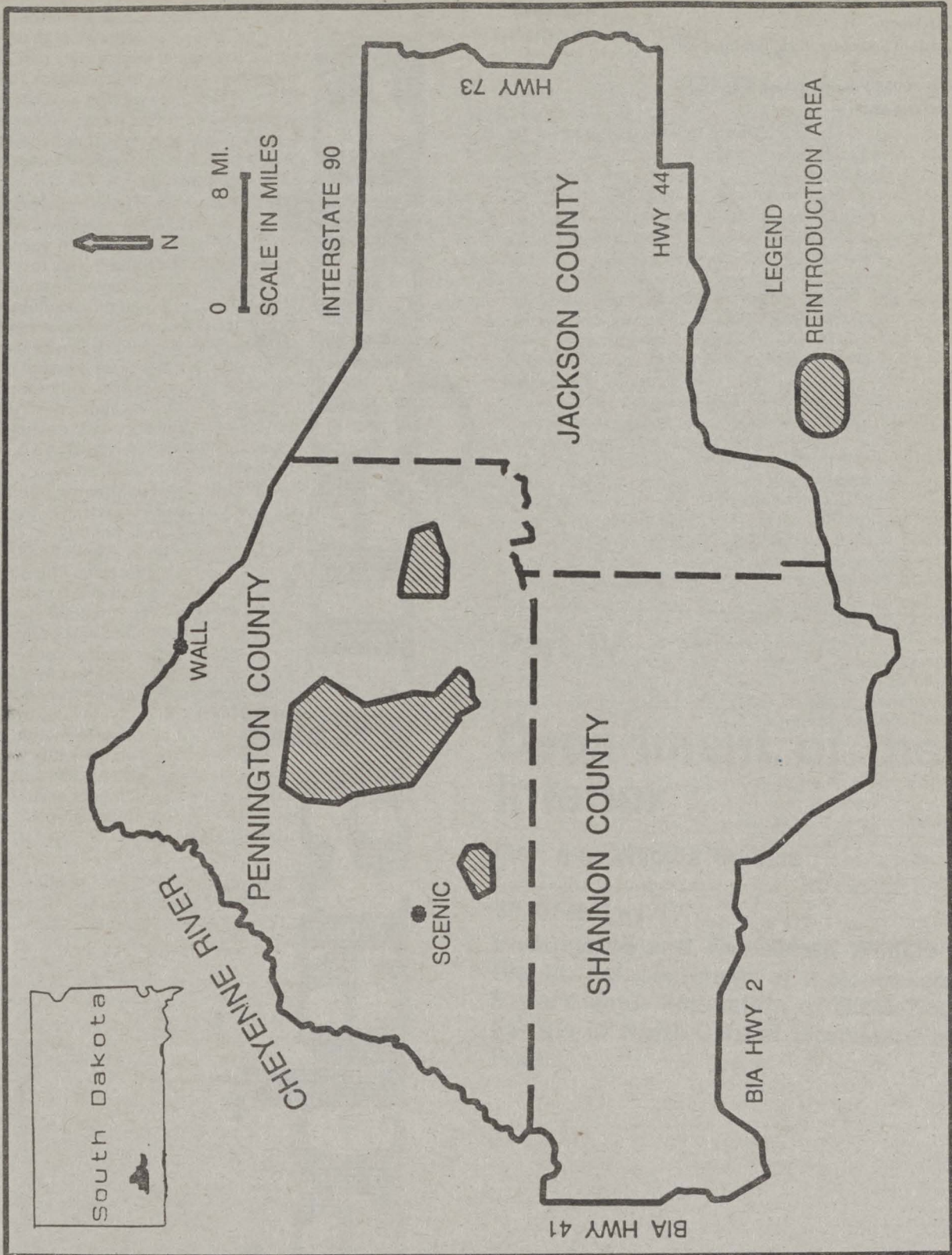
(11) The status of each experimental population will be re-evaluated within the first 5 years after the first year of release of black-footed ferrets to determine future management needs. This review will take into account the reproductive success and movement patterns of individuals released into the area, as well as the overall health of the experimental population and the prairie dog ecosystem in the above described areas. Once recovery goals are met for delisting the species, a rule will be proposed to address delisting.

(12) This 5-year evaluation will not include a re-evaluation of the "nonessential experimental" designation for these populations. The Service does not foresee any likely situation which would call for altering the nonessential experimental status of any population. Should any such alteration prove necessary and it results in a substantial modification to black-footed ferret management on non-Federal lands, any private landowner who consented to the introduction of black-footed ferrets on his lands will be permitted to terminate his consent and the ferrets will be, at his request, relocated pursuant to paragraph (g)(4)(iii) of this rule.

* * * * *

4. Section 17.84 is amended by adding a map to follow the existing map at the end of paragraph (g).

BILLING CODE 4310-55-P



Dated: August 9, 1994.

Robert P. Davison,

*Acting Assistant Secretary, Fish, Wildlife and
Parks.*

[FR Doc. 94-20036 Filed 8-17-94; 8:45 am]

BILLING CODE 4310-65-P

Black-Footed Ferret

Thursday
August 18, 1994

Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and
Plants: Establishment of a Nonessential
Experimental Population of Black-Footed
Ferrets in North-Central Montana; Final
Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AB96

Endangered and Threatened Wildlife and Plants: Establishment of a Nonessential Experimental Population of Black-footed Ferrets in North-Central Montana

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service), in cooperation with the Montana Department of Fish, Wildlife and Parks, will reintroduce black-footed ferrets (*Mustela nigripes*) into the 11,061 km² (4,237 mi²) North-central Montana Black-footed Ferret Experimental Population Area in north-central Montana. This reintroduction will implement a primary recovery action for this endangered species and also allow evaluation of release techniques. Provided conditions are acceptable, a minimum of 20 surplus captive-raised ferrets will be released in 1994 and annually thereafter for 2 to 4 years, or until a wild population is established. Releases will test ferret reintroduction techniques and, if fully successful, will result in a wild population within 5 years. The north-central Montana population is designated a nonessential experimental population in accordance with section 10(j) of the Endangered Species Act of 1973, as amended. This population will be managed in accordance with the provisions of the accompanying special rule.

EFFECTIVE DATE: September 19, 1994.

ADDRESSES: The complete file for this rule is available for public inspection, by appointment, during normal business hours at the following Service offices:

- Regional Office, Ecological Services, 134 Union Boulevard, Lakewood, Colorado, (303) 236-8189.
- U.S. Fish and Wildlife Service, Billings Suboffice, Ecological Services, 1501 14th Street West, Suite 230, Billings, Montana, (406) 657-6750.

FOR FURTHER INFORMATION CONTACT:

Mr. Ronald Naten, (303) 236-8189, at the Colorado address or Mr. Dennis Christopherson, (406) 657-6750, at the Montana address above.

SUPPLEMENTARY INFORMATION:**Background**

The background information included in this rule has been reduced from what was published in the proposed rule to reduce publishing costs. Please refer to the proposed rule published in the

Federal Register on April 13, 1993 (58 FR 19220), for more detailed information.

The black-footed ferret (*Mustela nigripes*) is an endangered carnivore with a black face mask, black legs, and a black-tipped tail. It is nearly 60 cm (2 ft) long and weighs up to 1.1 kg (2.5 lbs). It is the only ferret native to North America.

Though the black-footed ferret was found over a wide area historically, it is difficult to make a conclusive statement on its historical abundance due to its nocturnal and secretive habits. The black-footed ferret's historical range included 12 States (Arizona, Colorado, Kansas, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming) and the Canadian Provinces of Alberta and Saskatchewan. There is prehistoric evidence of this species from Yukon Territory, Canada, to New Mexico and Texas (Anderson et al. 1986). Although there are no specimen records for black-footed ferrets from Mexico, prairie dogs (*Cynomys* spp.) inhabit Chihuahua (Anderson 1972) and were present as far back as the Late Pleistocene-Holocene Age (Messing 1986). Black-footed ferrets depend almost exclusively on prairie dogs and prairie dog towns for food and shelter (Henderson et al. 1969, Forrest et al. 1985), and ferret range is coincident with that of prairie dogs (Anderson et al. 1986). No documentation exists of black-footed ferrets breeding outside prairie dog colonies. Consequently, it is probable that black-footed ferrets were historically endemic to northern Mexico.

Black-footed ferrets prey primarily on prairie dogs and use their burrows for shelter and denning. There are specimen records of black-footed ferrets from the ranges of three species of prairie dogs: black-tailed prairie dogs (*Cynomys ludovicianus*), white-tailed prairie dogs (*Cynomys leucurus*), and Gunnison's prairie dogs (*Cynomys gunnisoni*) (Anderson et al. 1986).

Widespread poisoning of prairie dogs and agricultural cultivation of their habitat drastically reduced prairie dog abundance and distribution in the last century. Sylvatic plague, which may have been introduced to North America around the turn of the century, also decimated prairie dog populations, particularly in the southern portions of their range. The severe decline of prairie dogs resulted in a concomitant and near-fatal decline in black-footed ferrets, though the latter's decline may be partially attributable to other factors such as secondary poisoning from prairie dog toxicants (e.g., strychnine) or high susceptibility to canine distemper.

The black-footed ferret was listed as an endangered species on March 11, 1967.

In 1964, a wild population of ferrets was discovered in South Dakota and was studied intensively for several years; this population became extinct in 1974, its last member dying in captivity in 1979. Afterwards, some believed that the species was probably extinct, until another wild population was discovered near Meeteetse, Wyoming, in 1981. The Meeteetse population underwent a severe decline between 1985 and 1986 due to canine distemper, which is fatal to infected ferrets. Eighteen survivors were taken into captivity in 1986 and 1987 to prevent extinction and to serve as founder animals in a captive propagation program aimed at eventually reintroducing the species into the wild.

In 6 years, the captive population has increased from 18 to over 300 black-footed ferrets. In 1988, the single captive population was split into three separate captive subpopulations to avoid the possibility that a single catastrophic event could wipe out the entire known population. Two additional captive subpopulations were established in 1990, and one additional captive subpopulation was established in 1991 and again in 1992, making a total of seven captive subpopulations. A secure population of 200 breeding adults was achieved in 1991, allowing initiation of ferret reintroductions into the wild.

Section 10(j) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), allows the Fish and Wildlife Service (Service) to designate certain populations of federally listed species that are released into the wild as "experimental populations." The circumstances under which this designation can be applied are: (1) The population is wholly separate geographically from nonexperimental populations of the same species (e.g., the population is reintroduced outside the species' current range but within its historical range); and (2) the Service determines that the release will further the conservation of the species. This designation can increase the Service's flexibility to manage a reintroduced population, because under section 10(j) an experimental population can be treated as a threatened species regardless of its designation elsewhere in its range, and, under section 4(d) of the Act, the Service has greater discretion in developing management programs for threatened species than for endangered species.

Section 10(j) of the Act requires, when an experimental population is designated, that a determination be

made by the Service whether that population is essential or nonessential to the continued existence of the species. Nonessential experimental populations located outside national wildlife refuge or national park lands are treated, for purposes of section 7 of the Act, as if they are proposed for listing. Thus, only two provisions of section 7 would apply outside National Wildlife Refuge System and National Park System lands: section 7(a)(1), which requires all Federal agencies to use their authorities to conserve listed species; and section 7(a)(4), which requires Federal agencies to confer with the Service on actions that are likely to jeopardize the continued existence of a proposed species. Section 7(a)(2) of the Act, which requires Federal agencies to insure that their activities are not likely to jeopardize the continued existence of a listed species, would not apply except on National Wildlife Refuge System and National Park System lands. Activities undertaken on private lands are not affected by section 7 of the Act unless they are authorized, funded, or carried out by a Federal agency.

However, pursuant to section 7(a)(2), individual animals comprising the designated experimental population may be removed from an existing source or donor population only after it has been determined that such removal is not likely to jeopardize the continued existence of the species. Moreover, removal must be conducted under a permit issued in accordance with the requirements in 50 CFR § 17.22.

Forty-nine black-footed ferrets were reintroduced as a nonessential experimental population to the Shirley Basin/Medicine Bow (Shirley Basin) area in southeastern Wyoming in September and October 1991. Subsequent surveys during November 7-14, 1991, found nine individual ferrets. Snow surveys conducted during March 1992 revealed sign of six to eight ferrets. Spotlight surveys conducted during July and August 1992 confirmed the presence of a minimum of four adult black-footed ferrets and two litters. One litter contained two young and the second contained four young ferrets. During September and October 1992 an additional 90 black-footed ferrets were released at the Shirley Basin site. Spotlight surveys in July 1993 confirmed the presence of a minimum of nine adults and four litters. Forty-eight ferrets were released at the Shirley Basin site in September and October 1993. Currently, the only known populations of black-footed ferrets are the experimental population at the Shirley Basin site and those animals in captivity.

In addition to this reintroduction, the Service and state wildlife agencies in 11 western states currently are identifying potential black-footed ferret reintroduction sites within the species' historical range. Potential reintroduction sites have been identified in Wyoming (two sites), Montana (one site), South Dakota (one site), Colorado (one site), Utah (one site), and Arizona (one site).

On April 13, 1993, the Service published a proposed rule in the *Federal Register* (58 FR 19220) to introduce black-footed ferrets into the North-central Montana Black-footed Ferret Experimental Population Area (Experimental Population Area) as a nonessential experimental population. This area is located in portions of Phillips and Blaine Counties, Montana, and was historically occupied by black-footed ferrets. Numerous ferret surveys conducted in the Experimental Population Area have resulted in no evidence of ferrets currently inhabiting the area (Reading 1991). The latest physical evidence of black-footed ferrets in the Experimental Population Area was a skull collected in 1984.

To the best of our knowledge, any reintroduced population of ferrets in the Experimental Population Area would be wholly separate and distinct from other ferret populations.

Experimental Population Site: The Experimental Population Area encompasses 11,016 km² (4,237 mi²) and consists of 36 percent private land, 5 percent State trust land, 28 percent federally managed land (outside national wildlife refuges), 9 percent national wildlife refuge land, and 22 percent Fort Belknap Indian Reservation (Reservation) land. Except for the Little Rocky Mountains, the majority of the land area is actual or potential prairie dog habitat. Mapping conducted in 1988 and 1990 indicated that 19,223 hectares (46,886 acres) of prairie dog towns existed in the Experimental Population Area, with an estimated potential prey biomass to support 561 black-footed ferret families.

Reintroduction, habitat management, and intensive ferret management will occur in a smaller, specifically-delineated area called the North-central Montana Reintroduction Area (Reintroduction Area), which occurs within the Experimental Population Area. Specifics on the location and boundaries of the Reintroduction Area are provided in the accompanying special rule. The Reservation contained 8,572 hectares (20,907 acres) of prairie dog towns in 1990, and occurs entirely within the designated Experimental

Population Area but is not included within the Reintroduction Area.

Mapping of prairie dog towns completed during fall and summer of 1991 and 1992 showed a 52 percent reduction in prairie dog acreage within the Reintroduction Area from 1988 to fall 1992. Sylvatic plague is active in the complex and is believed to be the primary factor in the reduction of occupied acreage. Prairie dog colonies in the Reintroduction Area within 20 km (12.4 mi) of the release site will be resurveyed in the summer of 1994 prior to the release of black-footed ferrets.

The UL-Bend National Wildlife Refuge (NWR), adjacent to and administered by the Charles M. Russell NWR, is the primary release site (hereafter in this document this entire area will be referred to as the Charles M. Russell NWR to avoid confusion). If reintroduction is successful, ferrets will eventually disperse from the release site into other portions of the Reintroduction Area. If a ferret were to disperse outside the Reintroduction Area and/or to the Reservation, the affected landowner or the Fort Belknap Tribal Council has the option to request its removal. Even without such a request, authorized personnel could relocate the ferret to the Reintroduction Area or to captivity, if necessary.

Ferrets will be released into the Reintroduction Area only if biological conditions are suitable, and under a management framework determined to be acceptable to the State of Montana, the Service, private landowners, and other land managers in the area. Reintroduction will be re-evaluated if one or more of the following conditions occur:

- (1) The black-footed ferret habitat rating index (Biggins et al. 1993) for the Reintroduction Area falls below 50 percent of the 1988 level. This habitat rating index is based on abundance of prairie dogs and estimates the number of ferret families a prairie dog complex can support.

- (2) Failure to acquire or maintain a nonessential experimental population designation for the Reintroduction Area through the Federal rulemaking process.

- (3) Wild black-footed ferret populations are found within the Experimental Population Area prior to the first breeding season following the first reintroduction.

- (4) Active cases of canine distemper are diagnosed within the Reintroduction Area within 6 months prior to release.

- (5) Fewer than 20 black-footed ferrets are available for the first release.

- (6) Funding is not available to implement the reintroduction program.

Reintroduction protocol: In general, the reintroduction protocol will involve releasing a minimum of 20 ferrets in the first year of reintroduction and releasing ferrets annually thereafter, as needed, for 2 to 4 years or until a wild population is established. Captive animals selected for release will be as genetically redundant as possible with the gene pool in the captive breeding population; hence, any loss of released animals is unlikely to appreciably affect existing genetic diversity in the species. Moreover, because breeding ferrets in captivity is not a problem, any animals lost in the reintroduction effort could be replaced. To enhance genetic diversity in the reintroduced population, it may be necessary to release ferrets from other established, reintroduced nonessential populations (e.g., the Shirley Basin site).

Several strategies for releasing captive-raised black-footed ferrets will be utilized during the reintroduction: (1) Hard release with no pre-release conditioning (i.e., release without an acclimation period); (2) soft release (release with an acclimation period and gradual reduction in supplied food and shelter); and (3) pre-release conditioning in a quasi-natural environment followed by hard release (this technique may be used when sufficient numbers of black-footed ferrets are available). Ferrets will be released in September and October, when wild juvenile ferrets typically become independent and exhibit dispersal tendencies, and are physically capable of killing prey, avoiding predators, and adjusting to environmental extremes.

The hard release with no pre-release conditioning will utilize neither release cages or any preconditioning in a contained prairie dog colony. Ferrets will be transported to the release site and held for a minimum of 12 hours to ensure general health. Subsequently, the ferrets will be released into the prairie dog colonies from the transport container and will receive no supplementary care.

Soft release involves raising juveniles in captivity with little exposure to the physical and environmental demands experienced in the wild. These juvenile ferrets will then be placed into release cages with buried nest boxes at the Reintroduction Site. It may be desirable to surround each cage with an electric fence to prevent damage by cattle or big game. Ferrets will be held and fed in the release cages for 10 days while acclimating to the cage and immediately surrounding area. After 10 days, the doors to the release cages will be opened and the ferrets will be allowed access to the prairie dog colonies; however, food will continue to be

provided while the ferrets learn to kill prey in the prairie dog colony. This soft release design is similar to release protocol used at the Shirley Basin reintroduction site, except the Montana site is located in black-tailed prairie dog colonies, instead of white-tailed prairie dog colonies.

Pre-release conditioning prior to hard release will utilize black-footed ferrets raised from birth in a large, seminatural, enclosed prairie dog colony. In this design, the captive environment should allow a natural expression of genetically influenced behaviors, or, if behaviors are learned, the captive environment should provide appropriate stimuli to learning during the critical period. Presenting juvenile captive animals with stimuli resembling those prevalent in their natural environment may help individuals retain efficient use of adaptive traits and, subsequently, increase post-release survival by reinforcing inherent survival skills in natural ways at natural periods of development.

Regardless of release technique, it is expected that ferrets will be placed in separate burrow systems 200 meters (219 yards) apart within the same prairie dog colony. Ferrets will be released sequentially over a period of 3-8 weeks because all animals will not reach the proper age for release at once, and because it would be difficult to intensively monitor all radio-tagged animals if they are released simultaneously. The proposed rule stated that all ferrets released would be young-of-the-year. This final rule removes that language in an effort to broaden the Service's flexibility and options in managing the release and analyzing of reintroduction techniques. The Service believes removal of this language to be minor in nature and does not affect the intention of this rulemaking.

Prior to release, ferrets will be vaccinated against disease, as appropriate, including canine distemper if an effective vaccine is developed for ferret use by that time (an experimental distemper vaccine is now being tested). Preventative and, where necessary, corrective measures to reduce ferret predation by coyotes (*Canis latrans*), badgers (*Taxidea taxus*), raptors, or other predators will be undertaken in the initial phases of the release, but should not be necessary in the long term. Habitat conditions will be monitored continually during the reintroduction effort. If the ferret habitat rating index (Biggins et al. 1993) drops to unacceptable levels, ferrets will be released in another biologically suitable prairie dog complex in the

Reintroduction Area, translocated to another release site, released at the next scheduled site, or returned to captivity. Cooperative management actions will be taken to maintain overall prairie dog populations at 1988 levels in the Reintroduction Area.

All black-footed ferrets released will be appropriately marked (e.g., with a Passive Integrated Transponder (PIT) tag or non-toxic paints). Some ferrets (up to a maximum of 50) may be radio-tagged in the first year, while smaller samples may be radio-tagged in later years. Radio-tagged ferrets will be intensively monitored. Other ferrets will be monitored using spotlight, snow surveys, or visual sighting techniques.

It is unlikely that released ferrets or their offspring will emigrate outside of the Experimental Population Area. This is because the Experimental Population Area is essentially a large island of excellent ferret habitat (i.e., prairie dog colonies), while the surrounding area to the north, east, and west is relatively devoid of prairie dog colonies, and the Missouri Breaks and Missouri River on the southern edge of the Experimental Population Area are physiographic obstacles to migration. Given the large size of the Experimental Population Area, current knowledge of ferret mobility gained from radio-telemetry studies at Meeteetse between 1982 and 1986 (less than 7 km or 4.3 mi/night) and 1991 studies at the Shirley Basin site (17 km or 10.5 mi/night), and significantly better prey base and colonization opportunities within the Experimental Population Area, it is unlikely that ferrets will disperse outside of the Experimental Population Area.

Experimental reintroduction designs will be tested and possibly modified at this and/or upcoming reintroduction sites. The Montana release will be limited by the number of captive ferrets available in excess of captive population objectives, needs of the Shirley Basin reintroduction site, and the needs of other ferret reintroduction sites initiated in the future. However, the 20 to 56 ferrets available for release in Montana in 1994 are considered sufficient to begin testing the proposed release techniques and to monitor results.

Realistically, the Service and the Montana Department of Fish, Wildlife and Parks (Department) expect high mortality rates (up to 90 percent) among released ferrets in the first year of release. Despite pre-release conditioning, captive-bred animals will be relatively naive in terms of avoiding predators, securing prey, and withstanding environmental rigors. Mortality is expected to be highest

within the first month of release. A realistic goal for the first year, based on experience at the Shirley Basin site, would be for 20 percent of released ferrets to survive at least 1 month after release, with perhaps 10 percent of released animals surviving the winter.

Intensive studies conducted on the wild Meeteetse population between 1982 and 1986, and in 1991 and 1992 at the Shirley Basin reintroduction site will provide a natural baseline against which the Montana reintroduction effort can be compared to determine how well the experiments are proceeding. Ferrets have a high level of natural mortality in the wild, based on studies at Meeteetse. Population data presented by Forrest et al. (1988) was used for computer simulation modeling by Harris et al. (1989), and indicated juvenile mortality rates of a stable population of approximately 78.5 percent. Since young-of-the-year ferrets will be used in the reintroduction program initially, these data will provide a basis of comparison. Additionally, these baseline data will be supplemented with baseline biological and behavioral data gathered in the 1960's and 1970's from the South Dakota population.

If successful, this reintroduction effort is expected to result in the establishment of a free-ranging population of at least 50 adult black-footed ferrets within the Reintroduction Area by a target date of 1998. The Service and Department will evaluate progress of the reintroduction annually, including sources of mortality. The biological status of the population at the site will be re-evaluated within the first 5 years to determine future management needs. However, the 5-year review will not include an evaluation to determine whether the nonessential experimental designation for the Montana ferret population should be changed. The Service anticipates that this designation will not be changed for the Montana ferret population unless the experiment is determined to be a failure (and this rulemaking is terminated) or until the species is determined to be recovered (and is delisted). Once recovery goals are met for delisting the species, a proposed rule to delist will be prepared.

The revised Black-footed Ferret Recovery Plan (Recovery Plan) (USFWS 1988) establishes objectives and outlines steps for recovery that, when accomplished, will provide for viable black-footed ferret populations in captivity and within its historical range. These objectives include:

(1) Increasing the captive population of black-footed ferrets to a census size of 200 breeding adults by 1991 (this

recovery goal subsequently was changed to 240 and has been achieved);

(2) Establishing a pre-breeding census population of 1,500 free-ranging black-footed ferret breeding adults in 10 or more populations with no fewer than 30 breeding adults in any population by the year 2010; and

(3) Encouraging the widest possible distribution of reintroduced black-footed ferret populations.

Status of Reintroduced Population

The north-central Montana black-footed ferret population will be designated a nonessential experimental population according to the provisions of section 10(j) of the Act. The basis for this designation is explained below. The 1988 Recovery Plan states as one of its goals the development of a captive population containing a minimum of 200 animals. This number was chosen to maintain maximum genetic variability and to ensure enough animals to protect the species from a stochastic event; however, it has since been revised to 240 by the Species Survival Plan Group of the American Zoological and Aquarium Association, which manages the captive ferret population. To date, the captive program contains over 300 black-footed ferrets separated geographically into 7 different breeding facilities. With the recovery goal of 240 animals achieved, the captive population can now supply surplus animals for reintroduction efforts. As described in the Wyoming final rule published in the *Federal Register* on August 21, 1991 (56 FR 41473), the captive population will be the donor population from which surplus ferrets will be taken for reintroduction activities. Without the protection of the donor or captive population, reintroduction efforts could not occur. Therefore, the captive donor population is essential to the recovery of the species by supplying surplus ferrets for reintroduction.

The "experimental population" designation means the reintroduced ferret population will be treated as a threatened species rather than an endangered species. Under section 4(d) of the Act, this designation enables the Service to develop special regulations for management of the population that are less restrictive than the mandatory prohibitions covering endangered species. Thus, the experimental designation allows the management flexibility needed to ensure that reintroduction is compatible with current or planned human activities in the reintroduction area and to permit biological manipulation of the population for recovery purposes.

Experimental populations can be determined as either "essential" or "nonessential." An essential experimental population means a population "whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild" [50 CFR 17.80 (Subpart H—Experimental Populations)]. All other experimental populations are treated as "nonessential." For purposes of section 7(a)(2) of the Act, nonessential experimental populations are treated as though they are proposed for listing (except on National Wildlife Refuge System and National Park System lands, where they are treated as a species listed as threatened under the Act).

The captive black-footed ferret population is the primary species population. It has been protected against the threat of extinction from a single catastrophic event by splitting the captive population into seven widely separated subpopulations.

The primary repository of genetic diversity for the species is the approximately 240 adult breeders in the captive population. Animals selected for reintroduction purposes will be as genetically redundant as possible with the captive population. Hence, any loss of reintroduced animals in the Montana experimental population would not significantly impact species survival or the goal of preserving maximum genetic diversity in the species.

All animals lost during the reintroduction attempt can be readily replaced through captive breeding, as demonstrated by the rapid increase in the captive population over the past 6 years. Based on current population dynamics, 100 juvenile ferrets will likely be produced each year in excess of numbers needed to maintain 240 breeding adults in captivity.

The concept of experimental populations and classifying them as nonessential was amended into the Act by Congress in 1982 to make it easier to reintroduce individuals of an endangered or threatened species in areas where there was local opposition to the reintroduction. This is discussed in greater detail later in this document under Issue 1.

The Experimental Population Area does not currently contain ferrets; the proposed nonessential experimental population will include all ferrets taken from captivity and released into the Experimental Population Area and all their progeny.

This reintroduction effort will be the Service's second attempt to reintroduce the black-footed ferret into the wild. The biological and logistical problems of reintroducing and recovering this

species that remain to be addressed are significant. However, reintroduction attempts must continue or the captive population may become overly adapted to captivity. In the long run, exclusive captivity likely would increase the risk of ferrets losing important wild survival instincts and reduce the likelihood of successful reintroduction and ultimately recovery of the species.

Fifty-eight percent of the land in the Experimental Population Area is privately managed or on the Fort Belknap Indian Reservation. The nonessential experimental population designation will facilitate reestablishment of this species in the wild by easing landowner concerns about the effects on their activities of protection measures for reintroduced ferrets. The experimental population designation is less restrictive than the "endangered" designation and provides a more flexible management framework for protecting and recovering black-footed ferrets, thereby reassuring non-Federal landowners that they may continue their current lifestyles.

Resource management plans for U.S. Bureau of Land Management (BLM) lands within the Reintroduction Area provide for prairie dog management for black-footed ferrets while maintaining traditional multiple uses such as prairie dog shooting, grazing, oil and gas development, etc. The Charles M. Russell NWR, the primary ferret release site, will serve as a refugium where land management conflicts can be avoided. Management plans for the refuge allow for prairie dog expansion but does not allow prairie dog shooting; cattle grazing is either restricted or absent.

First attempts to reintroduce black-footed ferrets into the wild (including the Shirley Basin and Montana reintroductions) will place great emphasis on developing and improving reintroduction techniques. This applied research will lay the groundwork for a general black-footed ferret reintroduction and management protocol for other reintroduction sites, which the Service, together with other State and Federal authorities, expects to develop after initial reintroductions. Thus, an inability to establish a Montana population in the first few years of effort will not be considered to "appreciably reduce the likelihood of the survival of the species in the wild" (50 CFR 17.80), because the knowledge and data obtained during this reintroduction effort in black-tailed prairie dog colonies will be used to improve reintroduction techniques, thereby enhancing the probability of successful future reintroductions at other sites.

As ferret reintroduction efforts progress, the Service will evaluate each potential reintroduction site to determine whether subsequently released populations should be proposed as nonessential experimental or essential experimental populations or should retain their endangered status. The Service believes that at least 10 individual wild populations are needed to ensure the immediate survival and downlisting of this species to threatened status (U.S. Fish and Wildlife Service 1988).

Location of Reintroduced Population

Under section 10(j) of the Act, an experimental population must be wholly separate geographically from nonexperimental populations of the same species. Since the last known member of the original Meeteetse ferret population was captured for inclusion in the captive population in 1987, no ferrets other than those released in Wyoming in 1991, 1992, and 1993 have been confirmed anywhere in the wild. There is a chance that ferrets may still exist in the wild outside the Shirley Basin site. However, thousands of hours of ferret survey and habitat evaluation work have been conducted in the general vicinity of the proposed Montana reintroduction site and no wild ferrets have been found. Based on these data, the Service does not believe that the reintroduced population will overlap with any wild population of the species.

The Experimental Population Area lies between the Milk River on the north and the Missouri River on the south in Phillips and Blaine Counties. The eastern boundary is the Phillips/Valley County line. The west boundary follows the west edge of the Reservation to the southwestern corner, then extends south to the Missouri River along the Phillips/Blaine County line.

Since 1978, 175 ferret surveys at 138 different prairie dog colonies covering over 14,351 hectares (35,463 acres) have been conducted in the Experimental Population Area. Wildlife biologists spent approximately 14,122 hours on all prairie dog colonies within the area performing activities related to ferrets, prairie dogs, or species associated with prairie dogs, and local residents were extensively contacted and solicited for ferret observations. No live ferrets were located. Based on this survey work, it is reasonable to conclude that wild black-footed ferrets no longer exist in the area encompassed by the Experimental Population Area boundary. Consequently, barring strong evidence to the contrary (such as a wild ferret being found in the Experimental

Population Area before the first breeding season), the Service with this final rulemaking administratively determines that wild ferrets no longer exist in the Experimental Population Area prior to this release.

The Reintroduction Area will serve as the core recovery area for the north-central Montana experimental population; i.e., efforts to maintain ferret and prairie dog populations will focus on the Reintroduction Area. The Reintroduction Area covers 206,000 hectares (502,000 acres) composed of approximately 40 percent BLM-administered lands, 30 percent private lands, 20 percent National Wildlife Refuge System lands, and 10 percent lands managed by the Corps of Engineers, the Bureau of Reclamation, or the Montana Department of State Lands. Within the Reintroduction Area are approximately 6,201 hectares (15,068 acres) of prairie dog colonies: 2,718 BLM hectares (6,604 acres); 1,851 Charles M. Russell National Wildlife Refuge hectares (4,500 est. acres); 349 Department of State Land hectares (848 acres); and 1,282 private hectares (3,116 acres). Under this final rule, ferrets that move to habitat outside the Reintroduction Area, including habitat on the Reservation, could be returned to the Reintroduction Area.

Prior to the first breeding season following the first ferret releases in Montana, all marked ferrets inhabiting the Experimental Population Area will comprise the nonessential experimental population. During and after the first breeding season, all ferrets inhabiting the Experimental Population Area, including all progeny of released animals, will comprise the nonessential experimental population.

There are significant barriers to ferret movement within and bordering the Experimental Population Area. These barriers are the Missouri River and, most importantly, the paucity of significant prairie dog colonies outside the Experimental Population Area. These movement barriers are expected to impede ferret dispersal within and outside the Experimental Population Area.

All ferrets released in the Reintroduction Area will be appropriately marked (e.g., with radio collars, PIT tags, or non-toxic paints). In the unlikely event that an unmarked ferret is found in the Experimental Population Area before the first breeding season (February-May 1995) following the fall 1994 release, a concerted effort will be initiated to find the location of the source wild population. This search will determine whether a wild population exists; if

such a population is confirmed, authorities will take appropriate cooperative action for its conservation. These actions would be guided by a "Final Contingency Plan for Disposition of Black-footed Ferrets Found in the Wild in Montana," developed by the Montana Department of Fish, Wildlife and Parks (MDFWP 1987); this plan calls for notification of Service and Department officials and affected landowners. If a wild ferret population was found, up to nine male and/or nonlactating female ferrets would be removed and transported to captive breeding facilities. The impact of the ongoing establishment of a nonessential experimental population in the Reintroduction Area on any newly found population would also be evaluated and appropriate action taken. In addition, any unmarked black-footed ferrets found outside the Experimental Population Area following the first breeding season will be "DNA fingerprinted" to determine if the individual(s) emigrated from the Experimental Population Area. If so, they would be returned to the Reintroduction Area or to captivity and become part of the captive breeding colony.

Management

The Montana ferret reintroduction project will be undertaken by the Service and the Department in accordance with the North-central Montana Black-footed Ferret Reintroduction and Management Plan (Management Plan) (MDFWP 1992). Copies may be obtained from the Montana Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, Montana 59620 (telephone 406/444-2535). This Management Plan will be updated as necessary. Details on the monitoring of prairie dogs and black-footed ferrets were discussed extensively in the proposed rule (58 FR 19220) but are not repeated here.

The Service will assist in ensuring that governmental agencies and the public are informed about the presence of ferrets in the affected area via public information and education programs and media. These programs also will address the precautions and care that should be taken in handling sick and injured ferrets. This will enhance effective treatment and care in handling specimens and, if dead ferrets are located, will ensure proper preservation of ferret remains. The finder or investigator will be requested to ensure that evidence intrinsic to the specimen is not unnecessarily disturbed.

The Service will require that persons who take a ferret or who locate a dead,

injured, or sick ferret immediately notify the State Supervisor, Fish and Wildlife Service, Ecological Services, Helena, Montana.

1. Disease considerations: Reintroduction will be reevaluated if an active case of canine distemper is documented in any wild mammal within 6 months prior to the scheduled reintroduction. Samples from approximately 20 coyotes will be obtained prior to reintroduction to determine if active canine distemper exists in the reintroduction area. Visitors and biologists will be discouraged from bringing dogs into the Reintroduction Area. Residents and hunters will be encouraged to vaccinate pets and report unusual wildlife behaviors and dead animals. Efforts are continuing to develop an effective long-term canine distemper vaccine for ferrets.

Ferrets will not be released into the Reintroduction Area or those already released will be relocated from the Reintroduction Area if the ferret habitat rating index (Biggins et al. 1993) falls below acceptable minimum levels as a result of sylvatic plague. Sylvatic plague has been documented in the proposed reintroduction area; therefore, monitoring will occur on a regular basis prior to and during the reintroduction effort. To the extent possible, strategies will be developed to enhance prairie dog recovery in areas impacted by plague.

2. Prairie dog management: The Service and Department will work cooperatively with landowners and land management agencies in the Reintroduction Area to: (a) Maintain an objective of 10,660 hectares (26,000 acres) of prairie dog habitat of mixed ownership, and (b) manage the prairie dog acreage at release sites at or below the 1988 survey level before ferrets are released (prairie dogs could be subject to control measures if their numbers exceed 1988 levels). Specific measures for managing the prairie dog ecosystem in the Reintroduction Area are described in the Management Plan. The Department, in cooperation with the Service, will coordinate prairie dog management programs, agendas, and the roles of participating agencies and individuals. A local Citizens Steering Committee will be used to assist the Department with this task. In areas where prairie dogs become a problem for the landowner, control techniques compatible with ferret recovery objectives could be implemented—e.g., through Environmental Protection Agency registered toxicants, nonlethal control methods (barriers, mechanical

land treatment, water development, or grazing management) and shooting.

3. Mortality: Though efforts will be made to minimize ferret mortality during the reintroduction, significant mortality will inevitably occur as captive-raised animals adapt to the wild. Natural mortality from predators, fluctuating food availability, disease, hunting inexperience, etc., will be reduced through predator and prairie dog management, vaccination, soft release, supplemental feeding, and pre-release conditioning. Human-caused mortality will be reduced through information and education efforts directed at landowners and land users and review and cooperative management (where necessary) of human activities in the area.

A low level of mortality from "incidental take" (defined under the Act as take that is the result of, but not the purpose of, an otherwise lawful activity) is expected during the reintroduction because the program has been designed to work within the context of traditional land uses in the Reintroduction Area, such as grazing and ranching activities.

Incidental take (e.g., ferret injury or mortality) will be required to be reported immediately to the Service. The Service will investigate each case. If it is determined that a ferret injury or mortality was unavoidable, unintentional, and did not result from negligent conduct lacking reasonable due care, such conduct will not be considered "knowing take" for the purpose of this regulation. Therefore, the Service will not seek legal action for such conduct. However, knowing take will be referred to the appropriate authorities for prosecution.

The biological opinion prepared on the reintroduction anticipates an incidental take level of 12 percent/year. If this level of incidental take is exceeded at any time within any year, the Service, in cooperation with the Department, will conduct an evaluation of incidental take and cooperatively develop and implement with landowners and land users measures to reduce incidental take.

Even if all released animals were to succumb to natural and human-caused mortality factors, this would not threaten the continued existence of the species, because the captive population is the species' primary population and could readily replace any animals lost in the reintroduction effort. This is consistent with the design of the reintroduced population as a nonessential experimental population. The choice for wildlife managers is either to risk the loss of surplus captive-bred ferrets during reintroduction efforts

designed to re-establish the species in the wild, or to keep all ferrets in the relative safety of captivity. The Service believes the long-term benefits to the species of establishing individual wild ferret populations outweighs the relatively minor risks associated with losses of surplus ferrets during reintroduction efforts.

4. *Special handling:* Under the special regulation [promulgated under authority of section 4(d) of the Act] that will accompany the experimental population designation, Service and Department employees and agents would be authorized to handle ferrets for scientific purposes (such as replacing radio collars); relocate ferrets to avoid conflict with human activities; relocate ferrets that have moved outside the Reintroduction Area when removal is necessary or requested; relocate ferrets within the Experimental Population Area to improve ferret survival and recovery prospects; relocate ferrets to future reintroduction sites; aid animals which are sick, injured, or orphaned; and salvage dead ferrets. If a ferret is determined to be unfit to remain in the wild, it would be returned to captivity. The Service would determine the disposition of sick, injured, orphaned, or dead ferrets.

5. *Coordination with landowners and land management agencies:* The Montana ferret reintroduction program was discussed with potentially affected State and Federal agencies in the proposed Reintroduction Area. A scoping effort to identify issues and concerns associated with the reintroduction was conducted prior to the development of the proposed rule, and a North-central Montana Working Group (Working Group) consisting of representatives from the Department, the Service, and BLM was assembled. The Working Group was instrumental in developing the reintroduction program and has acted as a recovery implementation group; it helped locate a suitable reintroduction area, defined the boundaries of the Experimental Population Area, identified issues and concerns, developed release protocols and research objectives, and made written recommendations. The Working Group's recommendations were incorporated into the Management Plan (MDFWP 1992).

The Working Group received assistance from the North-central Montana Black-footed Ferret Advisory Committee. This committee was established by the State of Montana and consisted of two representatives from the Animal and Plant Health Inspection Service, three from business, three landowners, the county agent for

Phillips County, and representatives from the Montana Department of State Lands, the Montana Department of Agriculture, the Bureau of Indian Affairs, the National Wildlife Federation, the Fort Belknap Tribe, and the Yale School of Forestry and Environmental Studies. In addition, affected private land managers in the area were consulted and offered the opportunity to participate in development of the Management Plan. Public meetings concerning the proposed Montana ferret reintroduction were held in Missoula, Malta, Fort Belknap, Billings, and Miles City, Montana, in December 1991 to offer the general public in Montana the opportunity to learn about and comment on the reintroduction proposal. Although support for the reintroduction was expressed at the Miles City, Billings, and Missoula meetings, local residents within the Reintroduction Area did not support the project.

6. *Potential for conflict with oil and gas and mineral development activities:* Because all existing oil, gas, and mineral leases in the Reintroduction Area do not occur in prairie dog habitat, and the probability of new bentonite or oil and gas development is considered low, it is unlikely that oil and gas development in the Reintroduction Area would preclude establishment of a viable wild population of ferrets, even assuming full development of current oil and gas leases. If new oil or gas fields were developed in the Reintroduction Area, the Service, the Department, and BLM would work with affected companies to develop mutually agreeable means to avoid or mitigate potential adverse impacts from oil and gas activities on ferrets or their habitat. In addition, the Service is currently developing oil and gas guidelines for new leases and oil and gas projects proposed in prairie dog ecosystems managed for black-footed ferret recovery.

7. *Potential for conflict with grazing and recreational activities:* All BLM administered lands in the Reintroduction Area are included in grazing allotments. However, conflicts between grazing and ferret management are not anticipated on Federal lands, because current BLM rangeland management systems provide for prairie dog populations in grazed areas. No additional grazing restrictions will be placed on BLM lands with grazing allotments in the Reintroduction Area as a result of ferret reintroduction.

No restrictions in addition to existing requirements will be placed on prairie dog control activities by private landowners. Under the Management Plan, landowners can readily control

prairie dogs on their lands. Elimination of prairie dogs on private or State lands within the Reintroduction Area would not prevent establishment of a self-sustaining ferret population, because sufficient prairie dog numbers to support such a population exist on Federal lands.

Recreational activities currently practiced in the Reintroduction Area (e.g., antelope hunting, prairie dog shooting, furbearer or predator trapping, and off-road vehicle recreation) are either unlikely to impact ferrets or, if negative impacts to ferrets are demonstrated, will be managed to avoid or minimize such impacts.

8. *Protection of ferrets:* Released ferrets will initially need protection from natural sources of mortality (predators, disease, inadequate prey, etc.) and from human-caused sources of mortality. Natural mortality will be reduced through pre-release conditioning, soft release, vaccination, predator control, management of prairie dog populations, etc. Human-caused mortality will be minimized by placing ferrets in an area with low human population density and relatively low development; by informing and working with local landowners, Federal land managers, developers, and recreationists to develop methods for conducting existing and planned activities in a manner compatible with ferret recovery; and by conferring with developers on proposed actions and providing recommendations that will reduce likely adverse impacts to ferrets.

A final biological opinion was prepared on this action to reintroduce ferrets into the Experimental Population Area and concluded that this action is not likely to jeopardize any listed species.

9. *Overall:* The designation of the north-central Montana ferret population as a nonessential experimental population and its associated management flexibility should encourage local acceptance of and cooperation with the reintroduction effort. The Service and Department consider the nonessential experimental population designation and accompanying special rule, the Management Plan, and the commitment to accommodate cooperatively planned oil, gas, and mineral exploration and development necessary to receive the cooperation of affected landowners, agencies, and citizens, and oil and gas, minerals, grazing, and recreational interests in the area.

10. *Effective date:* Pursuant to 5 U.S.C. 553(d)(3), this rule will take effect 30 days after publication. It is essential to the success of the

reintroduction effort that ferret releases commence in the fall of the year, when wild young ferrets typically would become independent of natal care and disperse. The Service hopes to begin initial ferret releases in the Montana Reintroduction Area in late September 1994.

Summary of Comments and Recommendations

In the April 13, 1993, proposed rule and associated notifications, all interested parties were invited to submit comments or recommendations concerning any aspect of the proposed rule that might contribute to the development of a final rule. Appropriate State agencies, county governments, Federal agencies, business and conservation organizations, and other interested parties were contacted and requested to comment. On April 22, 1993, the Service mailed letters notifying 368 persons and organizations of the proposed rule and solicited their comments. Of these 368 persons and organizations notified, all were provided copies of the proposed rule, and 350 were provided with a list of 8 offices where copies of the draft environmental assessment and Management Plan could be obtained. A detailed legal notice inviting public comment was published in the Phillips County News on April 28, 1993; the Billings Gazette on April 29, 1993; and the Great Falls Tribune on April 30, 1993. On April 19, 1993, a news release was mailed to 74 newspapers, 4 television stations, and 4 radio stations in Montana. Eight government offices (seven in Montana, one in Colorado) were identified as distribution points where one could obtain copies of the rule, draft Management Plan, and the draft environmental assessment. A public hearing on the proposed rule was held on May 24, 1993, in the Malta City Hall, Malta, Montana.

The Service received letters and/or oral comments from 41 commenters, including 2 State agencies, 3 county or local government offices, 7 businesses or business organizations, 10 conservation groups, and 19 individuals. Fifteen commenters supported a nonessential experimental reintroduction; six commenters opposed reintroduction; six commenters supported reintroduction under full protection of the Act; six commenters supported an essential experimental reintroduction; and two commenters did not support reintroduction but wanted a nonessential experimental designation if black-footed ferret reintroduction went forward. Comments of a similar nature or point are grouped into a number of

general issues. These issues, and the Service's response to each, are discussed below:

Issue 1: Should the reintroduced population be designated as a nonessential experimental population? Fifteen commenters supported the nonessential experimental designation, and 12 commenters supported a more restrictive designation based on their belief that a nonessential experimental designation was not justified and/or did not offer adequate protection to reintroduced ferrets or ferret habitat. Two commenters indicated that using the captive breeding population as the only essential population violates the Act. One commenter believed the Service should designate at least one wild population of black-footed ferrets as essential to the continued existence of the species in the wild.

Response: The Service's rationale for designating the Montana ferret reintroduction as a nonessential experimental population was explained above under "Status of Reintroduced Population." Establishment of a wild population in the Experimental Population Area is not essential to the continued existence of the species in the wild. The donor captive population, which is the population whose loss would appreciably affect the likelihood of survival of the species in the wild, is secure and other reintroduction sites are being identified and readied.

The captive population is the primary species population. It has been protected against the threat of extinction from a single catastrophic event through splitting the captive population into seven widely separated subpopulations. Hence, loss of the experimental population would not threaten the species' survival.

The primary repository of genetic diversity for the species is the 240 adult breeders in the captive population. Animals selected for reintroduction purposes will be as genetically redundant as possible with the captive population; hence, any loss of reintroduced animals in this experimental population will not significantly impact the goal of preserving maximum genetic diversity in the species.

All animals lost during the reintroduction attempt can readily be replaced through captive breeding, as demonstrated by the rapid increase in the captive population over the past 6 years. Based on current population dynamics, 100 juvenile ferrets will likely be produced each year in excess of numbers needed to maintain 240 breeding adults in captivity.

There are no known populations of ferrets in the wild except for the nonessential experimental population reintroduced into the Shirley Basin area in Wyoming. The only other ferrets known to exist are in captive breeding facilities. Because the breeding program has been so successful, there are more ferrets in captivity than are needed for the breeding program or for ensuring the survival of the species. Ferrets that are the subject of this rule are surplus animals that the Service has determined are not needed for these purposes. Having a sufficient number of black-footed ferrets in the breeding program means that the Service will be able to continue to produce surplus ferrets for reintroductions and thus bring about the survival of the species in the wild.

Consequently, the captive breeding population is the population that is essential to the survival of the species in the wild. The nonessential designation is based on the Service's conclusion that those ferrets to be removed from captivity and reintroduced into the wild are not needed for the survival of the species in the wild. If the released animals are lost, they can be replaced with other black-footed ferrets produced in captivity.

Issue 2: Some commenters argued that because captive ferrets would be released into the wild, and there are no nonexperimental ferrets currently in the wild, and the only other ferrets in the wild are nonessential, therefore the loss of ferrets to be reintroduced into Montana would appreciably reduce the survival of the species in the wild. This criticism centers on the issue of whether the species will survive "in the wild."

Response: These commenters mistakenly focus on ferrets after they have been reintroduced instead of focusing on the donor population of ferrets in captive breeding facilities. The former are the ferrets which are being reclassified from endangered to nonessential experimental and which the Service has determined are not needed for the survival of the species in the wild. It is the black-footed ferrets in the breeding program that are essential to the survival of the species in the wild, because these are producing surplus animals that can be used for reintroductions to establish wild populations. Without the captive ferret population, no additional ferret reintroductions could occur and the outlook for survival of the species in the wild would be extremely uncertain at this time.

The Service's position is supported by the preamble to the final rule for establishing experimental populations (August 27, 1984; 49 FR 33885). It

explains that the organisms that will be reclassified as experimental are those which are to be removed from an existent source or donor population. Additionally, a comment on the proposed rule that preceded the final rule on experimental populations was that no species classified as endangered could have populations biologically nonessential to their survival. In its final rule, the Service disagreed with this comment and stated " * * * there can be situations where the status of the extant population is such that individuals can be removed to provide a donor source for reintroduction without creating adverse impacts upon the parent population. This is especially true if the captive propagation efforts are providing individuals for release into the wild."

Furthermore, the Service referred to the Conference Report, which is especially significant because the definition of "essential population" in the final rule is virtually identical to the language in the Conference Report. Congress explained, " * * * (T)he level of reduction necessary to constitute 'essentiality' is expected to vary among listed species and, in most cases, experimental populations will not be essential" [H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess., 34 (1982)].

The Senate report explains that the special regulations designating experimental populations are to be designed to address the "particular needs" of each experimental population and that the Secretary is "granted broad flexibility" in promulgating the special regulations [S. Rep. No. 97-418, 97th Cong., 2d Sess. 8 (1982)].

It also is important to recognize that one reason Congress amended the Act in 1982 was to provide for experimental populations. The House Report is instructive on this point. It states that reintroduction efforts had encountered strong opposition from the States and areas where species were to be reintroduced. Opponents were concerned that if introduced species were to be fully protected under the Act, then conflicts with existing uses would result and new development would be curtailed. Congress amended the Act to mitigate and alleviate such fears.

Issue 3: One commenter stated that the Service's position that only black-footed ferrets in the captive population will be fully protected by the Act is arbitrary, capricious, and contrary to the intent of Congress to work affirmatively for conservation of the species in the wild.

Response: The Service has not decided that black-footed ferrets in captivity are the only ferrets that will

ever receive full protection under the Act. However, as discussed under Issue 1, the Service maintains that it has the authority under section 10(j) of the Act to designate released populations as "nonessential experimental" if such action will further the conservation of the species, and if the decision is based on the best scientific and commercial data available.

Issue 4: One commenter indicated that it is not appropriate to consider the captive population the essential population when the intent of the Act is the recovery of a given species in the wild rather than in captivity.

Response: The Service agrees that the intent of the Act is to achieve recovery of the species in the wild. However, as explained under Issue 1 and Issue 2, it is appropriate to consider the captive ferret population as the essential population, since reintroductions at this time depend on the surplus ferrets produced by captive animals. Reintroducing surplus animals from the captive population into north-central Montana as a nonessential experimental population, together with other future reintroductions, is expected to result in recovery of the species in the wild. The revised Black-footed Ferret Recovery Plan requires that 10 ferret populations be established before downlisting the species to threatened status can occur, and the captive population is necessary to establish these populations through the reintroduction process. Thus, the captive ferret population is essential to recovery of the species in the wild.

Issue 5: Two commenters stated that an "essential" designation provides greater protection for ferrets from impacts such as grazing, trapping, prairie dog hunting, and oil and gas development. Three commenters suggested that section 7 consultation provisions of an essential designation should be provided for black-footed ferret reintroductions in Montana.

Response: The Service agrees that an essential designation would provide for a more stringent review of these types of activities under section 7 of the Act than the planned nonessential designation. However, the Service is part of the Working Group that developed the Management Plan that will guide how these activities are carried out within the Experimental Population Area. Thus, the Service contributed substantially to the Management Plan and believes it provides adequate protection for ferrets during these activities and will lead to establishment of a black-footed ferret population in north-central Montana.

Issue 6: One commenter stated that no formal definition is given in the ruling

or in Service regulations as to what constitutes a nonessential population. In light of extreme susceptibility of black-footed ferrets and prairie dogs to disease and other natural and human-caused threats, a population of genetically redundant individuals does not automatically make that population nonessential.

Response: The Service's final rule that established regulations for experimental populations (49 FR 33885) defines an essential experimental population as " * * * an experimental population whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild." All other experimental populations are to be classified as nonessential (i.e., one whose loss would not be likely to appreciably reduce the likelihood of the survival of the species in the wild). As explained under Issue 1, the loss of the nonessential experimental population in north-central Montana will not appreciably reduce the likelihood of the survival of the species in the wild because other surplus black-footed ferrets in captivity could be used to reestablish this population or create additional populations in the wild. This is based on the success of the captive breeding program and expected availability of captive-bred offspring for current and future reintroductions. The Service agrees that a population of genetically redundant individuals does not automatically make that population nonessential but believes in this case the designation is appropriate.

Issue 7: One commenter believed that the Service should at least recognize the portion of ferret population on Federal lands as essential.

Response: As explained under Issue 1, the Service considers the captive ferret population to be the population which is essential to the survival of the species in the wild, because it produces the surplus animals needed for currently proposed reintroduction efforts. Failure or loss of the captive population would jeopardize all future reintroductions and the survival of the species itself. However, failure of the Montana reintroduced population would not directly affect the captive population or future ferret reintroductions. Thus, the Service sees little justification for designating a portion of the Montana population (in this case, the portion on Federal land) as essential experimental, since that portion would not be biologically segregated from the balance of the population, nor would it be essential to the survival of the species in the wild.

Issue 8: One commenter indicated that the nonessential experimental

designation is being proposed only to counter local opposition to black-footed ferret recovery and that this opposition is really countered by the majority of Americans' support for recovery of all endangered species.

Response: As explained under Issue 2, Congress incorporated the use of experimental populations into the Act in 1982 for the specific purpose of providing the Service with flexibility in reintroducing endangered or threatened species back into their historical habitat for the purpose of conservation of such species. The Service appreciates this flexibility, for in this case as in others it allows recovery to proceed at a faster pace than would be possible if the Service had to overcome the opposition to reintroducing the animals as endangered. Furthermore, because sufficient safeguards are built into reintroduction and management plans, the Service believes that emphasis is better placed on reintroducing captive animals into the wild to establish populations and bring about recovery as soon as possible, than on arguing about the term under which the animals will be reintroduced.

The Service agrees that there is a high degree of support from the American public for the recovery of endangered species. However, opposition to the reintroduction of an endangered or threatened species is often most pronounced from residents of the area in which a reintroduction will occur. As discussed earlier, it was this opposition that persuaded Congress to amend the Act in 1982 to allow for experimental populations.

Issue 9: One commenter stated that the captive population has kept this species from extinction but reintroduction to the wild is necessary for long-term survival and successful reintroduction cannot be accomplished with a nonessential designation.

Response: Because no wild ferret populations have been found since the last individuals in the Meeteetse, Wyoming, population were taken into captivity in 1986 and 1987 to save them from canine distemper, the captive population may indeed have saved the species from extinction. Reintroduction is certainly necessary to bring about long-term survival in the wild. However, the Service believes that successful reintroduction can be accomplished with a nonessential designation, based on the Management Plan and the accompanying special rule. The 1988 Recovery Plan states as one of its recovery goals, the development of 10 populations. The recovery plan does not state under what designation those populations must be.

Issue 10: One commenter pointed out that the proposed rule states that, "As additional wild populations become established, the captive population will diminish in relative importance and wild populations will increase in relative importance in the overall species recovery effort." This places an increased importance on the Montana population, thus making it all the more essential to recovery of the species "in the wild."

Response: The Service agrees that as wild populations become established, and the number of animals available in the wild increases, the captive population will diminish in relative importance to survival of the species in the wild. However, at this time loss of the captive population would be catastrophic, since few wild ferrets (those at the Shirley Basin site) would be available to re-establish the captive population. Furthermore, the captive population will remain important until establishment of the 10 wild populations needed for recovery is accomplished, both as a source of animals for reintroduction and as insurance against stochastic environmental events in wild populations. Conversely, the planned Montana population can be readily established or re-established from the captive population. Thus, the Service considers the captive population to be far more important to the survival of the species in the wild than the planned Montana population. Whether the Montana population is essential to recovery of the species "in the wild" was discussed under Issue 2.

Issue 11: One commenter indicated that (1) continued captivity increases the risk of animals losing important wild survival instincts and reduces the likelihood of successful reintroduction and recovery; (2) the ability for black-footed ferrets within a wild population to maintain their instinctive skills highlights the importance of wild populations; and (3) the added protection of essential designation would better allow animals the freedom to practice these skills.

Response: The Service agrees that it is important to move ahead with the reintroduction of black-footed ferrets produced in captivity as soon as possible to decrease the risk of ferrets losing important survival skills. However, the Service also believes that sufficient protection has been built into the Management Plan and the accompanying special rule in this document to allow a sufficient number of animals to survive to utilize these skills.

Issue 12: Two commenters suggested that full protection of the Act is necessary so the opportunity to designate the Experimental Population Area as critical habitat is provided.

Response: The Service recognizes that critical habitat can be designated for an endangered or essential experimental population, but not for a nonessential experimental population. However, the Service believes that the Management Plan and the accompanying special rule in this document provides sufficient protection for this nonessential experimental population. Furthermore, the Service knows from past experience that the designation of critical habitat often faces significant local opposition. As discussed under Issue 2, the experimental population designation was amended into the Act by Congress in 1982 to alleviate opposition to the reintroduction of species listed under the Act.

Issue 13: One commenter questioned how the Service can declare the black-footed ferret recovered in 10-15 years if all populations in the wild are "nonessential experimental." Will reintroduced ferret populations in other states have full endangered species status? Two commenters objected that the Service did not indicate under what circumstances black-footed ferret populations will be considered "essential" in the future. They believed the Service should discuss biological and social parameters that, when met, will move reintroduced populations from nonessential to essential.

Response: Perhaps the issue of how population designation and recovery goals relate to each other should be clarified. Under the revised Black-footed Ferret Recovery Plan, the species may be downlisted from endangered to threatened when 10 ferret populations, each with at least 30 breeding adults, are established. Thus, downlisting is based on biological parameters (e.g., ferret numbers, density, survival, recruitment, habitat quality and quantity, etc.) and population stability. The Recovery Plan makes no distinction as to how these populations are designated; once biological criteria are satisfied, each reintroduced population will count toward recovery whether it is designated as endangered, essential experimental, or nonessential experimental. Furthermore, it is erroneous to assume that a nonessential experimental population is unprotected. While the special rule under section 4(d) of the Act will allow management flexibility for the planned Montana reintroduction, it also maintains many of the essential protections of the Act. With respect to the second portion of

the question, whether black-footed ferret populations reintroduced into other states will have full endangered status or be designated as essential experimental populations remains to be determined and will be based on the circumstances of each reintroduction.

Issue 14: One commenter indicated that a historic precedent will be set if the Service establishes that once a species has been declared extinct in the wild, and only exists in captive breeding facilities, that it will never again receive full protection of the Act when it is reintroduced into the wild.

Response: The Service disagrees that a historic precedent is being set. The Service has not declared the black-footed ferret extinct in the wild, nor has it said that the species will never again receive full protection of the Act when it is reintroduced into the wild. The designation of future reintroductions of ferrets and other species will depend on the specifics of those situations and not on how the Service designated the Shirley Basin or Montana ferret reintroduced populations.

Issue 15: One commenter suggested that the rule does not address how the Service plans to address long-term viability of ferrets in the wild. The commenter also stated that until then, all reintroductions should be essential.

Response: The Service has addressed the long-term viability of ferrets in the wild through recovery goals and objectives described in the 1988 revised Black-footed Ferret Recovery Plan. This plan identifies objectives that must be met to downlist the species to threatened, which in turn would ensure the long-term viability of the species in the wild. The revised recovery plan reflects current information and recovery objectives, and outlines steps for recovery that, when accomplished, will provide for viable black-footed ferret populations in captivity and within its historical range. These objectives include:

(1) Increasing the captive population of black-footed ferrets to a census size of 200 breeding adults by 1991 (this goal was subsequently changed to 240 and has been achieved);

(2) Establishing a prebreeding census population of 1,500 free ranging black-footed ferret breeding adults in 10 or more populations with no fewer than 30 breeding adults in any population by the year 2010; and

(3) Encouraging the widest possible distribution of reintroduced black-footed ferret populations.

It is the Service's opinion that the Recovery Plan will continue to be revised to reflect future requirements and direction to ensure recovery of the

black-footed ferret in the wild. In addition, the Service plans to develop a national strategy for implementing the ferret reintroduction program, based in part on initial reintroduction efforts. This strategy would outline the specific methods and means necessary to achieve recovery objectives cited in the Recovery Plan. See Issue 1 and Issue 2 for a further discussion of essential and nonessential experimental designations.

Issue 16: One commenter suggested that the Service develop an overall strategy regarding ferret reintroduction, which would include criteria for reintroduced population designations and a programmatic plan to implement reintroductions.

Response: The Service agrees. As explained in Issue 15, it is working toward a national reintroduction strategy that will address specific procedures for reaching objectives outlined in the Service's Black-footed Ferret Recovery Plan first developed in 1978 and revised in 1988.

Issue 17: One commenter stated that the Service has not adequately considered what effect potential loss of the experimental population will have on the species as a whole.

Response: The Service stated in the proposed rule that even if all ferrets released in the Montana reintroduction were to succumb to natural or human-caused mortality factors, this would not threaten the continued existence of the species. Unless the biological status of the captive ferret population changes significantly, it is the species' primary population and could readily replace any animals lost in the reintroduction effort. This is consistent with the designation of the Montana ferret reintroduction as a nonessential experimental population and remains the Service's position with respect to the captive population and planned Montana population.

Issue 18: Does the nonessential experimental designation and/or the Management Plan for the north-central Montana reintroduction provide adequate protection of ferret habitat? One commenter stated that it did not. Another commenter suggested the nonessential experimental designation appears to be an attempt to avoid restrictions on the kinds of human activities that led to loss of black-footed ferrets in the first place. Two commenters expressed concern that prairie dog shooting, predator trapping, off-road vehicle use, lead shot poisoning, and accidental trapping will adversely affect black-footed ferrets.

Response: The Service and the Department have worked with landowners and land users to develop a

management system wherein black-footed ferrets and human activities can coexist. This does not compare to human activities in black-footed ferret habitat in the past, which were relatively unregulated. If mixed-ownership sites can be used successfully for reintroduction, this is likely to increase local acceptance at future reintroduction sites, augment the number of sites deemed potentially suitable for reintroduction purposes, and increase the species' chances for recovery.

The Charles M. Russell National Wildlife Refuge will serve as a refugium in the Reintroduction Area where prairie dog shooting, off-road vehicle use, predator trapping, and trapping will be prohibited. On BLM lands, these activities are addressed in the Judith-Valley-Phillips Resource Management Plan and Environmental Impact Statement (JVP-RMP/EIS) (BLM 1991). BLM is committed to managing existing prairie dog towns and distribution on its lands for black-footed ferrets and associated species. BLM plans to designate prairie dog towns on BLM land within identified reintroduction areas as Areas of Critical Environmental Concern. BLM also plans to manage prairie dog shooting before and after ferret reintroduction; prairie dog shooting may temporarily be prohibited in prairie dog towns where black-footed ferret reintroduction is occurring, and would be managed in towns subsequently occupied by ferrets.

Issue 19: Has there been adequate coordination with the affected public during planning and consideration of this ferret reintroduction? One commenter questioned this and suggested that the Department of the Interior should increase local and State involvement before embarking on a project of this magnitude. Another commenter recommended that a Citizen's Steering Committee be part of black-footed ferret reintroduction efforts in the future.

Response: The North-central Montana Working Group first introduced the concept of ferret recovery to the general public at an open meeting in southern Phillips County in 1985. BLM subsequently initiated efforts to identify and address concerns of the public through the formation of a Prairie Dog/Black-footed Ferret Coordinated Resources Management Planning Group as part of the ongoing JVP-RMP/EIS. Additionally, during the period of July 15 to October 5, 1990, the Proposed Action was discussed with 53 ranchers having private land and/or BLM-administered grazing leases within the Reintroduction Area. Information

regarding the JVP-RMP/EIS process and the black-footed ferret reintroduction proposal was provided to ranchers by Department, BLM, and Service biologists. Public meetings in Montana were held in Missoula on December 2, 1991; Malta on December 9; Fort Belknap on December 10; Billings on December 11; and Miles City on December 12. These meetings offered the general public an opportunity to review and comment on the reintroduction proposal.

Procedures the Service used to disseminate notice of the reintroduction and copies of the proposed rule to designate the Montana ferret population as a nonessential experimental population, together with the draft environmental assessment, were described earlier. Copies of the final rule, Management Plan, and final environmental assessment will be provided to landowners, land users, and others requesting copies.

The Department and the Service intends to develop reasonable measures to accommodate landowners and land users still concerned about possible negative impacts to their operations as a result of ferret reintroduction.

As the Montana black-footed ferret reintroduction progresses, the Service will utilize recommendations from the Working Group to help guide the reintroduction. In addition, the Department has formed a local Steering Committee to assist in implementing the Management Plan. The Steering Committee consists of representatives of landowner, business, and other interest groups.

Issue 20: Will the government change the nonessential experimental designation sometime in the future? This concern was expressed by one commenter.

Response: Once this final rule goes into effect, changing the nonessential experimental designation of the north-central Montana ferret population would require a new rulemaking process, which would include a proposed rule, a public comment period, public meetings, National Environmental Policy Act compliance, and other documentation before a final rule to change the designation could be published. Under the experimental population regulations (50 CFR 17 Subpart H), any rule designating an experimental population must provide " * * * a process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species." The 5-year evaluation noted in section 17.84(g)(10) of the proposed rule is intended to be

a milestone in this required periodic review and evaluation process, and will be a review of the biological success of the reintroduction effort. If determined to be less than successful, the Service and the Department will modify the reintroduction protocol and/or the strategies within the Management Plan to improve ferret survival and/or recruitment, with the involvement of affected landowners and land managers. If the experiment is extremely unsuccessful, the Service and Department may consider a temporary hold on releasing ferrets into the Reintroduction Area until better release or management techniques are developed. The 5-year evaluation will not include an evaluation to determine whether the population should be reclassified.

The Service does not foresee any likely situation, except for eventual delisting of the species, that would call for altering the nonessential experimental status of the Montana ferret population. Should any such alteration prove necessary, however, it is possible that it would not change ferret management on private lands. If the designation changes and it is necessary to substantially modify ferret management on private lands, any private landowner who consented to ferret reintroduction on his lands would be permitted to terminate his consent and the ferrets would, at such request, be relocated.

Issue 21: Should the final rule incorporate specific management guidance regarding implementation of the experimental population? One commenter recommended that this should be done and suggested that guidance covering prairie dog shooting; leghold traps and snares; use of zinc phosphide, strychnine, and fumigants for prairie dog control; animal damage control; and incidental take provisions be included. Three commenters suggested that ranchers must have control of prairie dogs to prevent them from becoming an economic burden and that control of prairie dogs that move from Federal to private lands should be provided.

Response: Guidance addressing these management issues is included in the Management Plan. The Management Plan is referenced in the accompanying special rule as the document under which the nonessential experimental population will be managed. However, because the Management Plan will be dynamic in nature and updated as necessary, the rule refers to the Management Plan in a general sense rather than incorporating extensive management guidance. This will allow

revision of management practices without undertaking a new rulemaking.

Issue 22: Should the agreements between the Service and private landowners contain provisions to require removal of ferrets at the landowners' request and an "escape clause" to allow landowners to terminate agreements? One commenter suggested that any agreement should contain these provisions, as well as provisions regulating access to private property. Two commenters suggested that the reintroduction could adversely affect private property rights through land use restrictions under the Act.

Response: The designation of the reintroduced population as nonessential experimental, the accompanying special rule, and the Management Plan provide a means and system to reintroduce black-footed ferrets without affecting use of private lands. The Management Plan [Land Management Issues, section 1.(a)] states that black-footed ferret reintroduction does not supersede or reduce the right of private landowners to manage their property and that management actions will be implemented on private lands only with landowner approval. Section 1.(d) states that black-footed ferrets on private land in the Experimental Population Area will always be relocated if the affected landowner so requests.

Section 17.81(d) of the experimental population regulations (50 CFR 17, Subpart H) states, "Any regulation promulgated pursuant to this section shall, to the maximum extent practicable, represent an agreement between the Fish and Wildlife Service, the affected State and Federal agencies and persons holding any interest in land which may be affected by the establishment of an experimental population." The Service believes that this special rule acts in part as an agreement between the Service and affected parties. The Department may choose to enter into separate agreements with landowners during implementation of the Management Plan.

The Service and the Department will continue to work directly with affected parties within the framework of the experimental population designation and special rule and the Management Plan to make ferret recovery compatible with landowner and land user needs.

Issue 23: Should oil and gas guidelines be finalized before the north-central Montana nonessential experimental population is designated? One commenter urged that this be done. Another commenter was concerned that private lands that overlay Federal mineral, oil, and gas rights may be

subject to section 7 consultation requirements. (The term "oil and gas guidelines" in this question refers to guidelines being developed by the Service, in cooperation with BLM and the oil and gas industry, to ensure that oil and gas development is compatible with ferret reintroduction).

Response: The draft oil and gas guidelines do not need to be finalized before an initial ferret reintroduction attempt is made at the Montana site. Based on the projected low to moderate oil and gas development potential in the Reintroduction Area, and the siting of primary ferret release areas on the Charles M. Russell NWR, the Service believes there will be no significant conflicts between ferret recovery and ongoing oil and gas development. A general process for dealing with oil and gas development is outlined in the Management Plan, and mitigation measures will be negotiated on a case-by-case basis if a development proposal has the potential to adversely impact ferrets or their habitat.

Issue 24: One commenter was concerned as to whether any action that could be deemed a "taking" of a black-footed ferret will result in prosecution with civil or criminal penalties.

Response: The Service agrees that this is a legitimate concern and has included a provision in the special rule to allow for the "incidental take" of ferrets (i.e., take that results from, but is not the purpose of, the carrying out of otherwise lawful activities). Discussion regarding incidental take is included earlier in this rule in the Management section under "Mortality."

Issue 25: Are the boundaries of the Experimental Population Area appropriate? Three commenters were concerned that the Experimental Population Area was too large. Another commenter thought the Experimental Population area was too small and that released black-footed ferrets would leave the area. Another questioned whether black-footed ferrets ever occurred within the Experimental Population Area.

Response: Black-footed ferrets were historically found throughout eastern Montana. Forty-four specimens collected between 1887 and 1984 were from Montana, which includes Phillips County. In 1983, a black-footed ferret skull was found within the Experimental Population Area on the Fort Belknap Indian Reservation.

The Experimental Population Area boundaries were drawn to include all potential black-footed ferret habitat (prairie dog colonies) within the North-central Montana Prairie Dog Complex. The Service believes that the lack of

suitable habitat (i.e., contiguous prairie dog colonies or complexes) on the north, east, and west and the Missouri River on the south should deter the movement and establishment of black-footed ferrets outside the Experimental Population Area.

Section 17.84(9)(ii) of this rule describes disposition of black-footed ferrets found outside the Experimental Population Area in Montana.

Issue 26: Should the primary purpose of the Montana reintroduction be to test release techniques or to establish a viable black-footed ferret population? One commenter suggested that the primary purpose of the reintroduction should be to establish a black-footed ferret population, and two commenters thought offspring of reintroduced black-footed ferrets should be used for future reintroductions. One commenter also disagreed with the use of radio-telemetry to monitor ferrets, suggesting that radio collars adversely affect ferret behavior, thus increasing early mortality. This commenter also suggested that lack of predator monitoring would confound the meaning of predation-caused mortality data, that sufficient data already exists to demonstrate expected behavior of cage-reared ferrets, and that other, less obtrusive techniques than radio collars are available to monitor the reintroduction effort. The commenter also believed the only difference between hard and soft release is that one group of ferrets will be held 127 days and another group 136 days. One commenter thought that telemetry could be used as a tool to increase ferret survival by returning ferrets to the release colony as soon as they leave the site.

Response: The purpose of the reintroduction is to implement a primary recovery action for the black-footed ferret and to evaluate release techniques. The Montana release will test ferret reintroduction techniques and, if fully successful, will result in a wild population within 5 years.

Releases of black-footed ferrets are considered experimental, both by legal definition and according to the chronological sequence of technique development described in the revised Black-footed Ferret Recovery Plan. The Recovery Plan (section 413) stresses identification of variables that could affect the outcome of release and measurement of the effect of those variables. The Recovery Plan also suggests employing valid statistical design for the experiments. Sections 42 and 43 detail experimental release needs and suggest reliance on mark/recapture and radio-telemetry. Section

44 describes operational reintroduction of ferrets. The recovery plan suggests that the first three releases should evaluate reintroduction success and release techniques. The Service does not interpret this to mean that ferret populations cannot become established during the initial releases, or even that the probability of establishment of a population will be lower. It does mean that learning about the process has a high priority in the Montana release. Testing rearing methodology and release techniques and establishing a viable black-footed ferret population are not mutually exclusive goals.

Testing of manipulative research methods on black-footed ferrets has historically generated much discussion. A cursory review of the literature turned up 11 papers (representing 10 authors in the period 1968-1974) suggesting increased use of manipulative methods on ferrets. Suggestions for this type of research came during a period when the black-footed ferret was regarded as nearly extinct; consequently, the risk/reward evaluation must have been greatly influenced by the perceived high value of each individual animal. Currently, genetically redundant black-footed ferrets are being produced in captivity. Nevertheless, manipulative research may be more valuable during the experimental reintroduction phase of the recovery program than at any previous time or at any time in the future. Problems identified at this time can be corrected and reintroduction strategies for future reintroductions can be refined.

One problem identified during the Wyoming ferret release was retaining animals at or near the reintroduction site. Loss of ferrets during this release was primarily due to long distance dispersal and death, with the latter mostly due to predation. Pre-release conditioning methods show promise in reducing dispersal, and a variation of pre-release conditioning is a proposed part of the experimental design of the Montana reintroduction. Soft-releases (i.e., providing cages, an acclimation period, and post-release food supply) have been used exclusively in past ferret releases at considerable effort and expense. There has been little assessment of the benefits of soft release, because such assessments must be comparative and no other release techniques have been tested. The experimental design for the Montana release includes the traditional soft release and a hard release (no acclimation period and no supplemental food). The contention that the survival of black-footed ferrets may be enhanced by holding animals for 10 days at the

release site to allow for acclimation and orientation is one of the elements being tested and is part of the experimental design. Ultimately, the goal is to compare efficiency of the three techniques (soft release, hard release, and hard release with pre-release conditioning) in terms of ferret establishment and survival at the reintroduction site relative to costs. In a more immediate sense, statistical null hypotheses being tested relate to lack of significant differences between the three groups in terms of several measurable behaviors. If sufficient black-footed ferrets are available, another group of black-footed ferrets will be released in an identical manner but without being radio-collared. Spotting, snow tracking and mark/recapture methods will be used to monitor mid- and long-term survival of both groups of animals.

Black-footed ferret releases in Montana will be the first reintroduction of this species in black-tailed prairie dog towns. The Service believes it is worthwhile to obtain as much detailed data as possible on black-footed ferret behavior, dispersal, and mortality within this habitat type. Radio-telemetry will provide the most detailed data. One of the recognized tradeoffs when using radio-telemetry is potential additional risk to the collared animals. Actual risk has not been assessed, but no mortality due to radio collars has been documented in 5 years of field studies on black-footed ferrets or 5 additional years of work on Siberian ferrets in Asia and the United States. Problems with radio collars (e.g., mud accumulation and degradation of material) have been greatly reduced during years of development and testing, and observations of telemetered ferrets in captivity and in the wild has not shown that radio collars adversely affect behavior.

Radio-telemetry also has been used to rescue and/or identify dispersing animals that may benefit by returning them to the release site. A radio-tagged black-footed ferret in Wyoming that was rehabilitated and relocated in 1991 was one of the two females that reproduced the following year.

Issue 27: One commenter suggested that all black-footed ferrets be released on Federal lands. Another suggested that, because private lands encompass 36 percent of the Experimental Population Area, private landowners are essential to the reintroduction program. A third suggested that endangered species protection can be better achieved by providing incentives to landowners rather than instituting land-use restrictions.

Response: The initial release of black-footed ferrets is being planned on Charles M. Russell NWR (Federal land). The Service also envisions that future releases would most likely be on national wildlife refuge land or Federal lands administered by the BLM. Black-footed ferrets would not be released on private lands without the support and permission of the landowner. The Service agrees that cooperation of private landowners is an essential part of the Montana black-footed ferret reintroduction program. The stated goal of the Management Plan is "To promote the recovery and delisting of the black-footed ferret (*Mustela nigripes*) by reintroducing and establishing a free-ranging, cooperatively managed, black-footed ferret population in the North-central Montana Complex in a way that is compatible with existing local economies and lifestyles and to maintain a positive working relationship with the local landowners." Strategies formulated in the Management Plan avoid conflicts with landowner operations. Black-footed ferret reintroduction does not supersede or reduce the right of private landowners to manage their property. Cooperative management of black-footed ferret habitat (prairie dog colonies) on private rangelands is encouraged. However, the use of private lands is not necessary for this black-footed ferret reintroduction.

Issue 28: One commenter expressed concern about the apparent linkage of the Montana rule to the Wyoming rule. The respondent understood that each reintroduction would be evaluated separately and a separate rulemaking would be completed for each site.

Response: The Service agrees. However, to conserve printing costs during the annual updating of title 50 of the U.S. Code of Federal Regulations, provisions common to both reintroductions are combined together and stated only once rather than repeating them for each Experimental Population Area in the accompanying special rule. But, provisions specific only to the Montana Experimental Population Area are presented in section 17.84(g)(9)(ii) of the special rule.

Issue 29: Four commenters questioned the Federal government's use of Pyrethroid dust to treat prairie dog burrows in an attempt to manage an active sylvatic plague epizootic. One commenter supported the effort.

Response: The Service and the BLM, after reviewing data on changes occurring since 1988 in prime black-footed ferret habitat on national wildlife refuge lands and public rangelands within the Experimental Population

Area, implemented a program during June 1993 to treat fleas in prairie dog burrows on two potential black-footed ferret release sites. Data collected in 1992 showed a 52 percent reduction in total prairie dog acreage within the Reintroduction Area and elimination of three of five potential release sites as result of documented sylvatic plague. The treatment of prairie dog burrows was implemented on Federal lands as part of the Federal government's commitment to manage prairie dog populations at 1988 population levels. An environmental assessment was completed and a Finding of No Significant Impact and Record of Decision were signed by the Charles M. Russell National Wildlife Refuge Manager on May 20, 1993, and the BLM, Lewistown District Manager on May 24, 1993.

Issue 30: One commenter believed there is no documented evidence that conservation of black-footed ferrets will be promoted through reintroduction and suggested that further reintroduction be delayed until reintroductions in Wyoming are proven to be a success. An alternate position was taken by two commenters who were concerned that black-footed ferrets in the captive population may be euthanized because breeding facilities are nearing capacity, and recommended that additional black-footed ferrets be released in the wild rather than establishing another captive facility.

Response: The Service disagrees that conservation of black-footed ferrets will not be promoted through reintroduction into the wild. The Black-footed Ferret Recovery Plan was updated in 1988 to provide a more up-to-date blueprint for actions to recover the species. Among other changes, the species' recovery goal was updated to include establishment of 10 or more black-footed ferret populations, each with at least 30 breeding adults (see Issue 15).

The Service is actively pursuing these recovery goals by encouraging establishment of cooperatively developed reintroduction sites, and results from black-footed ferret reintroduction in Wyoming in 1991 and 1992 are encouraging. Delays in re-establishing black-footed ferrets in the wild would not be in the long-term interest of recovery of this species in the wild.

The Service's intent is to secure sufficient release sites so that black-footed ferrets in excess of the captive population needs can be released in the wild. The Service does not envision that the captive population will produce black-footed ferrets in excess of those needed for the reintroduction program,

scientific purposes and display, and has no plans to euthanize animals in captivity.

Issue 31: Should the Service use a 50 percent reduction in the ferret habitat rating (Biggins et. al. 1993) as a criteria for re-evaluation of the Montana reintroduction program?

Response: The Service believes that re-evaluation of the program when a 50 percent reduction in the black-footed ferret family rating has occurred is appropriate. A 50 percent reduction in the black-footed ferret habitat rating index does not mean the Reintroduction Area would not be a viable reintroduction site, only that the quality of remaining habitat and viability of the site should be reassessed. Black-footed ferret habitat in the Reintroduction Area is currently being surveyed and the black-footed ferret habitat rating index will be determined using the 1994 data. If a 50 percent reduction in black-footed ferret family rating has occurred, the viability of the site will be reevaluated prior to the scheduled 1994 release.

Issue 32: Should the reintroduction protocol section in the proposed rule be discussed in more detail? One commenter suggested it should be.

Response: The Service does not believe it is necessary to provide more detail in the special rule. The referenced section describes the anticipated release strategy and techniques that will be used. Site specific details will be modified annually prior to each year's release and will utilize information obtained from previous releases. Detailed release methods for each year's release in the Montana program will be included in a protocol prepared prior to each release.

Issue 33: One commenter suggested that the following language be added to the rule: "There will be no loss of livestock AUM's [Animal Unit Months] on BLM land in the reintroduction area due to ferret reintroduction."

Response: Part 7 of the Supplementary Information section of this rule addresses grazing on public lands, stating: "No additional grazing restrictions will be placed on BLM lands with grazing allotments in the Reintroduction Area as a result of ferret reintroduction."

Issue 34: One commenter disagreed with the statement in the rule that, "Decreased animal unit months for livestock would not benefit prairie dog populations and would not be recommended as a tool for ferret management."

Response: Grazing by livestock does not in itself adversely affect prairie dog populations. Conversely, livestock grazing can create conditions that

enhance black-tailed prairie dog populations by reducing grass cover and increasing the distance across which prairie dogs can spot and escape predators.

Issue 35: Four commenters were opposed to the money being spent on ferret reintroduction and suggested that the money could better be spent on access roads or recreation sites on the Charles M. Russell National Wildlife Refuge. Four persons suggested the reintroduction will affect the economic stability of Phillips County and did not support changes in current recreation, grazing, prairie dog shooting, hunting, or potential bentonite mining activities.

Response: The Service is responsible under the Act for recovering the black-footed ferret. Because there are no known natural wild populations, reintroductions are necessary to recover the species.

The Service disagrees that the economic stability of Phillips County will be affected as a result of the black-footed ferret reintroduction. Some increase in visitor use of the Reintroduction Area by researchers and members of the public interested in observing or photographing black-footed ferrets is anticipated when ferrets are reintroduced. The level of this increase cannot be determined nor can the consequences to the local economy, though economic impacts of increased visitor use is likely to be beneficial rather than adverse. No significant changes in recreation, grazing, prairie dog shooting, hunting, or potential mining activities have been projected. The Management Plan addresses how each of these activities will be managed within the Reintroduction Area.

Issue 36: Two commenters felt that black-footed ferrets should be given full protection under the Act as a means of conserving the long-term viability of the entire prairie dog grassland ecosystem.

Response: Although conserving the long-term viability of the entire prairie dog grassland ecosystem may be an admirable goal, the purpose of this nonessential experimental population is to implement a recovery action for the black-footed ferret. The reasons for not providing reintroduced ferrets full protection under the Act are discussed earlier in this rule.

Issue 37: One commenter suggested that more than one black-footed ferret probably died from the plague in Wyoming.

Response: To the best of the Service's knowledge, only one black-footed ferret died of sylvatic plague in Wyoming.

Issue 38: One commenter expressed support for the Baucus-Chafee Endangered Species Act reauthorization

bill. The commenter also supported changes in the Act that would include economic and social impact studies to determine the extent of adverse economic effects resulting from listing of threatened and endangered species.

Response: This rulemaking does not address reauthorization of the Act.

National Environmental Policy Act

A final environmental assessment as defined under the authority of the National Environmental Policy Act of 1969 has been prepared and is available to the public at the Service offices identified in the ADDRESSES section. This assessment formed the basis for the decision that the planned Montana black-footed ferret reintroduction is not a major Federal action which would significantly affect the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969.

Required Determinations

This final rule was not subject to Office of Management and Budget review under Executive Order 12866. The rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Also, no direct costs, enforcement costs, information collection, or recordkeeping requirements are imposed on small entities by this action and the rule contains no record-keeping requirements, as defined in the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). This rule does not require a Federalism assessment under Executive Order 12612 because it would not have any significant federalism effects as described in the order.

References Cited

- Anderson, E., S.C. Forrest, T.W. Clark, and L. Richardson. 1986. Paleobiology, biogeography, and systematics of the black-footed ferret (*Mustela nigripes*) (Audubon and Bachman), 1851. Great Basin Naturalist Memoirs 8:11-62.
- Anderson, S. 1972. Mammals of Chihuahua—taxonomy and distribution. Bulletin of the American Museum of Natural History 148(2):280-281.
- Biggins, D., B. Miller, L. Hanebury, R. Oakleaf, A. Farmer, R. Crete, and A. Dood. 1993. In press. A system for evaluating black-footed ferret habitat. In Oldemeyer, J.L., D.E. Biggins, B.J. Miller, and R. Crete, Eds. Proceedings of the Workshop on the Management of Prairie Dog Complexes for Black-footed Ferret Reintroductions. USDI, Fish and Wildlife Service, Biological Report 93(13). 94 pp.

- Forrest, S.C., D.E. Biggins, L. Richardson, T.W. Clark, T.M. Campbell III, K.A. Fagerstone, and E.T. Thorne. 1988. Population attributes for the black-footed ferret at Meeteetse, Wyoming, 1981-1985. *J. Mammology* 69:261-273.
- Forrest, S.C., T.W. Clark, L. Richardson, and T.M. Campbell III. 1985. Black-footed ferret habitat: some management and reintroduction considerations. Wyoming Bureau of Land Management, Wildlife Technical Bulletin, No. 2. 49 pp.
- Harris, R.B., T.W. Clark, and M.L. Shaffer. 1989. Estimating extinction probabilities for black-footed ferret populations. Pages 69-82 in Seal, U.S., E.T. Thorne, M.A. Bogan, and S.A. Anderson, eds. *Conservation Biology and the Black-footed Ferret*. Yale University Press, New Haven and London.
- Henderson, F.R., P.F. Springer, and R. Adrian. 1969. The black-footed ferret in South Dakota. South Dakota Department of Game, Fish and Parks, Technical Bulletin 4:1-36.
- Messing, H.J. 1986. A late Pleistocene-Holocene fauna of Chihuahua, Mexico. *The Southwestern Naturalist* 31(3):277-288.

- Montana Department of Fish, Wildlife and Parks. 1987. Final contingency plan for the disposition of black-footed ferrets found in the wild in Montana. Montana Department of Fish, Wildlife and Parks, Helena. 2 pp.
- Montana Department of Fish, Wildlife and Parks. 1992. North-central Montana black-footed ferret reintroduction and management plan. Montana Department of Fish, Wildlife and Parks, Helena. 59 pages.
- Reading, R.P. 1991. Biological considerations for designating the North-central Montana prairie dog complex an experimental population area for black-footed ferrets. Bureau of Land Management, Malta, Montana. 23 pp.
- U.S. Bureau of Land Management. 1991. Judith-Valley-Phillips resource management plan and environmental impact statement. July 1991 Draft. Montana State Office, Helena.
- U.S. Fish and Wildlife Service. 1988. Revised black-footed ferret recovery plan. U.S. Fish and Wildlife Service, Denver, Colorado. 154 pages.

Authors

The principal authors of this rule are Dennis Christopherson and Ronald Naten (see **FOR FURTHER INFORMATION CONTACT** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Regulation Promulgation

Accordingly, part 17, subchapter B of chapter I, title 50 of the U.S. Code of Federal Regulations, is amended as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500, unless otherwise noted.

2. Section 17.11(h) is amended by revising the existing two entries for "Ferret, black-footed" under "MAMMALS" to read as shown below:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
MAMMALS							
Ferret, black-footed	<i>Mustela nigripes</i>	Western U.S.A., Western Canada.	Entire, except where listed as an experimental population below.	E	1, 3, 433, 543, 544	NA	NA
Do	do	do	U.S.A. (specific portions of Wyoming, Montana, and South Dakota).	XN	433, 543, 544	NA	17.84(g)

3. Section 17.84 is amended by revising the text of paragraph (g) to read as follows:

§ 17.84 Special rules—vertebrates.

* * * * *

(g) Black-footed ferret (*Mustela nigripes*)

(1) The black-footed ferret populations identified in paragraphs (g)(9)(i), (g)(9)(ii), and (g)(9)(iii) of this section are nonessential experimental populations. Each of these populations will be managed in accordance with their respective management plans.

(2) No person may take this species in the wild in the experimental population areas except as provided in paragraphs (g)(3), (4), (5), and (10) of this section.

(3) Any person with a valid permit issued by the U.S. Fish and Wildlife Service (Service) under § 17.32 may take black-footed ferrets in the wild in the experimental population areas.

(4) Any employee or agent of the Service or appropriate State wildlife agency, who is designated for such purposes, when acting in the course of official duties, may take a black-footed ferret from the wild in the experimental population areas if such action is necessary:

- For scientific purposes;
- To relocate a ferret to avoid conflict with human activities;
- To relocate a ferret that has moved outside the Reintroduction Area when removal is necessary to protect the ferret, or is requested by an affected

landowner or land manager, or whose removal is requested pursuant to paragraph (g)(12) of this section;

(iv) To relocate ferrets within the experimental population areas to improve ferret survival and recovery prospects;

(v) To relocate ferrets from the experimental population areas into other ferret reintroduction areas or captivity;

(vi) To aid a sick, injured, or orphaned animal; or

(vii) To salvage a dead specimen for scientific purposes.

(5) A person may take a ferret in the wild within the experimental population areas provided such take is incidental to, and not the purpose of, the carrying out of an otherwise lawful

activity and if such ferret injury or mortality was unavoidable, unintentional, and did not result from negligent conduct. Such conduct will not be considered "knowing take" for purposes of this regulation, and the Service will not take legal action for such conduct. However, knowing take will be referred to the appropriate authorities for prosecution.

(6) Any taking pursuant to paragraphs (g)(3), (4) (vi) and (vii), and (5) of this section must be reported immediately to the appropriate Service Field Supervisor, who will determine the disposition of any live or dead specimens.

(i) Such taking in the Shirley Basin/Medicine Bow experimental population area must be reported to the Field Supervisor, Ecological Services, Fish and Wildlife Service, Cheyenne, Wyoming (telephone: 307/772-2374).

(ii) Such taking in the Conata Basin/Badlands experimental population area must be reported to the Field Supervisor, Ecological Services, Fish and Wildlife Service, Pierre, South Dakota (telephone: 605/224-8693).

(iii) Such taking in the north-central Montana experimental population area must be reported to the Field Supervisor, Ecological Services, Fish and Wildlife Service, Helena, Montana (telephone: 406/449-5225).

(7) No person shall possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever any ferret or part thereof from the experimental populations taken in violation of these regulations or in violation of applicable State fish and wildlife laws or regulations or the Endangered Species Act.

(8) It is unlawful for any person to attempt to commit, solicit another to commit, or cause to be committed any offense defined in paragraphs (g)(2) and (7) of this section.

(9) The sites for reintroduction of black-footed ferrets are within the historical range of the species.

(i) The Shirley Basin/Medicine Bow Management Area is shown on the attached map and will be considered the core recovery area for the species in southeastern Wyoming. The boundaries of the nonessential experimental population will be that part of Wyoming south and east of the North Platte River within Natrona, Carbon, and Albany Counties (see Wyoming map). All marked ferrets found in the wild within these boundaries prior to the first breeding season following the first year of releases will constitute the nonessential experimental population during this period. All ferrets found in the wild within these boundaries during

and after the first breeding season following the first year of releases will comprise the nonessential experimental population thereafter.

(ii) The Conata Basin/Badlands Reintroduction Area is shown on the attached map for South Dakota and will be considered the core recovery area for this species in southwestern South Dakota. The boundaries of the nonessential experimental population area will be north of State Highway 44 and BIA Highway 2 east of the Cheyenne River and BIA Highway 41, south of I-90, and west of State Highway 73 within Pennington, Shannon, and Jackson Counties, South Dakota. Any black-footed ferret found in the wild within these boundaries will be considered part of the nonessential experimental population after the first breeding season following the first year of releases of black-footed ferrets in the Reintroduction Area. A black-footed ferret occurring outside the experimental population area in South Dakota would initially be considered as endangered but may be captured for genetic testing. Disposition of the captured animal may take the following action if necessary:

(A) If an animal is genetically determined to have originated from the experimental population, it may be returned to the Reintroduction Area or to a captive facility.

(B) If an animal is determined to be genetically unrelated to the experimental population, then under an existing contingency plan, up to nine black-footed ferrets may be taken for use in the captive-breeding program. If a landowner outside the experimental population area wishes to retain black-footed ferrets on his property, a conservation agreement or easement may be arranged with the landowner.

(iii) The North-central Montana Reintroduction Area is shown on the attached map for Montana and will be considered the core recovery area for this species in north-central Montana. The boundaries of the nonessential experimental population will be those parts of Phillips and Blaine Counties, Montana, described as the area bounded on the north beginning at the northwest corner of the Fort Belknap Indian Reservation on the Milk River; east following the Milk River to the east Phillips County line; then south along said line to the Missouri River; then west along the Missouri River to the west boundary of Phillips County; then north along said county line to the west boundary of Fort Belknap Indian Reservation; then further north along said boundary to the point of origin at the Milk River. All marked ferrets found

in the wild within these boundaries prior to the first breeding season following the first year of releases will constitute the nonessential experimental population during this period. All ferrets found in the wild within these boundaries during and after the first breeding season following the first year of releases will thereafter comprise the nonessential experimental population. A black-footed ferret occurring outside the experimental area in Montana would initially be considered as endangered but may be captured for genetic testing. Disposition of the captured animal may be done in the following manner if necessary.

(A) If an animal is genetically determined to have originated from the experimental population, it would be returned to the reintroduction area or to a captive facility.

(B) If an animal is determined not to be genetically related to the experimental population, then under an existing contingency plan, up to nine ferrets may be taken for use in the captive breeding program.

(10) The reintroduced populations will be continually monitored during the life of the project, including the use of radio-telemetry and other remote sensing devices, as appropriate. All released animals will be vaccinated against diseases prevalent in mustelids, as appropriate, prior to release. Any animal which is sick, injured, or otherwise in need of special care may be captured by authorized personnel of the Service or the Department or their agents and given appropriate care. Such an animal may be released back to its respective reintroduction area or another authorized site as soon as possible, unless physical or behavioral problems make it necessary to return the animal to captivity.

(11) The status of each experimental population will be re-evaluated within the first 5 years after the first year of release of black-footed ferrets to determine future management needs. This review will take into account the reproductive success and movement patterns of individuals released into the area, as well as the overall health of the experimental population and the prairie dog ecosystem in the above described areas. Once recovery goals are met for delisting the species, a rule will be proposed to address delisting.

(12) This 5-year evaluation will not include a re-evaluation of the "nonessential experimental" designation for these populations. The Service does not foresee any likely situation which would call for altering the nonessential experimental status of any population. Should any such

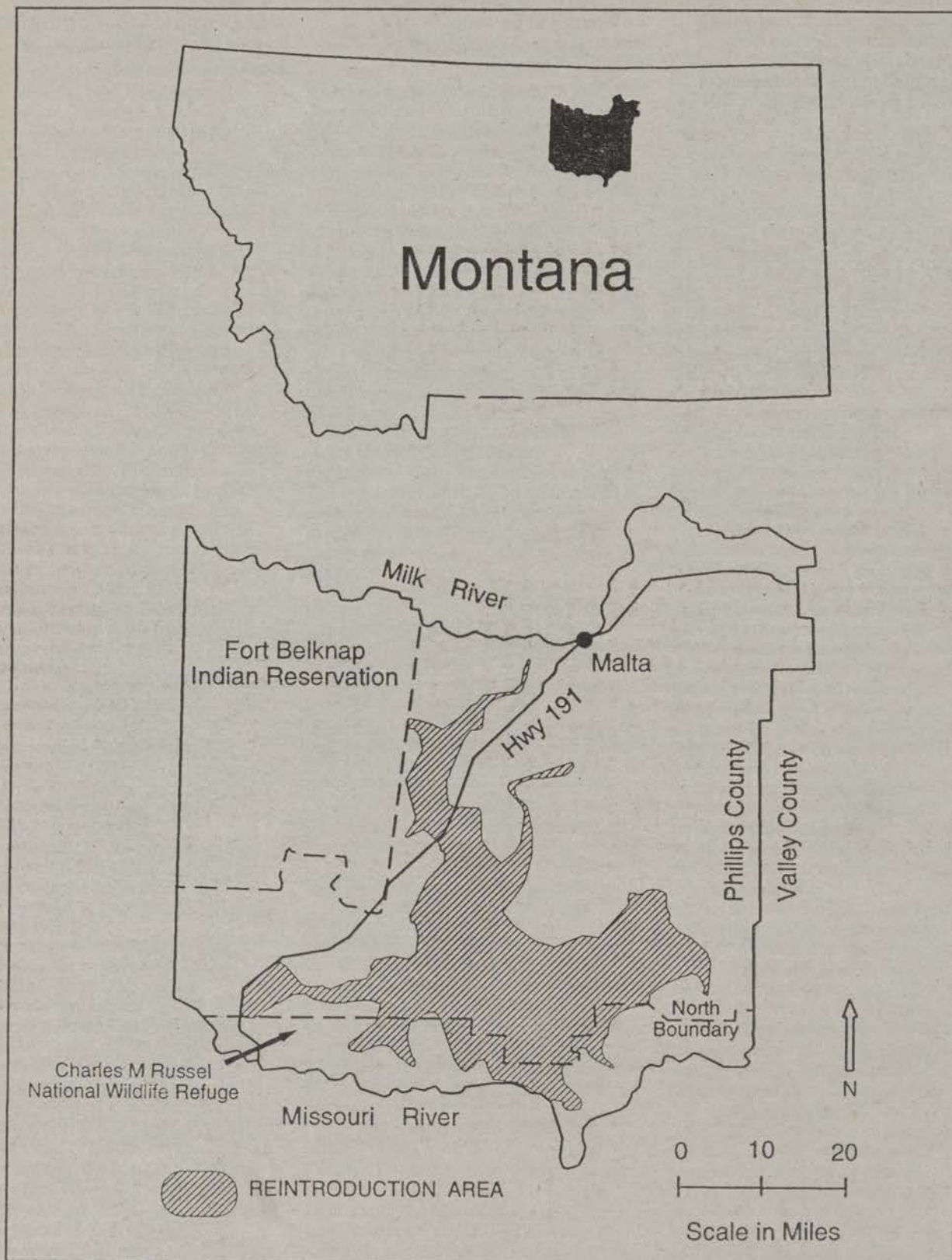
alteration prove necessary and it results in a substantial modification to black-footed ferret management on non-Federal lands, any private landowner who consented to the introduction of black-footed ferrets on his lands will be

permitted to terminate his consent and the ferrets will be, at his request, relocated pursuant to paragraph (g)(4)(iii) of this rule.

* * * * *

4. Section 17.84 is amended by adding a map to follow the existing two maps at the end of paragraph (g).

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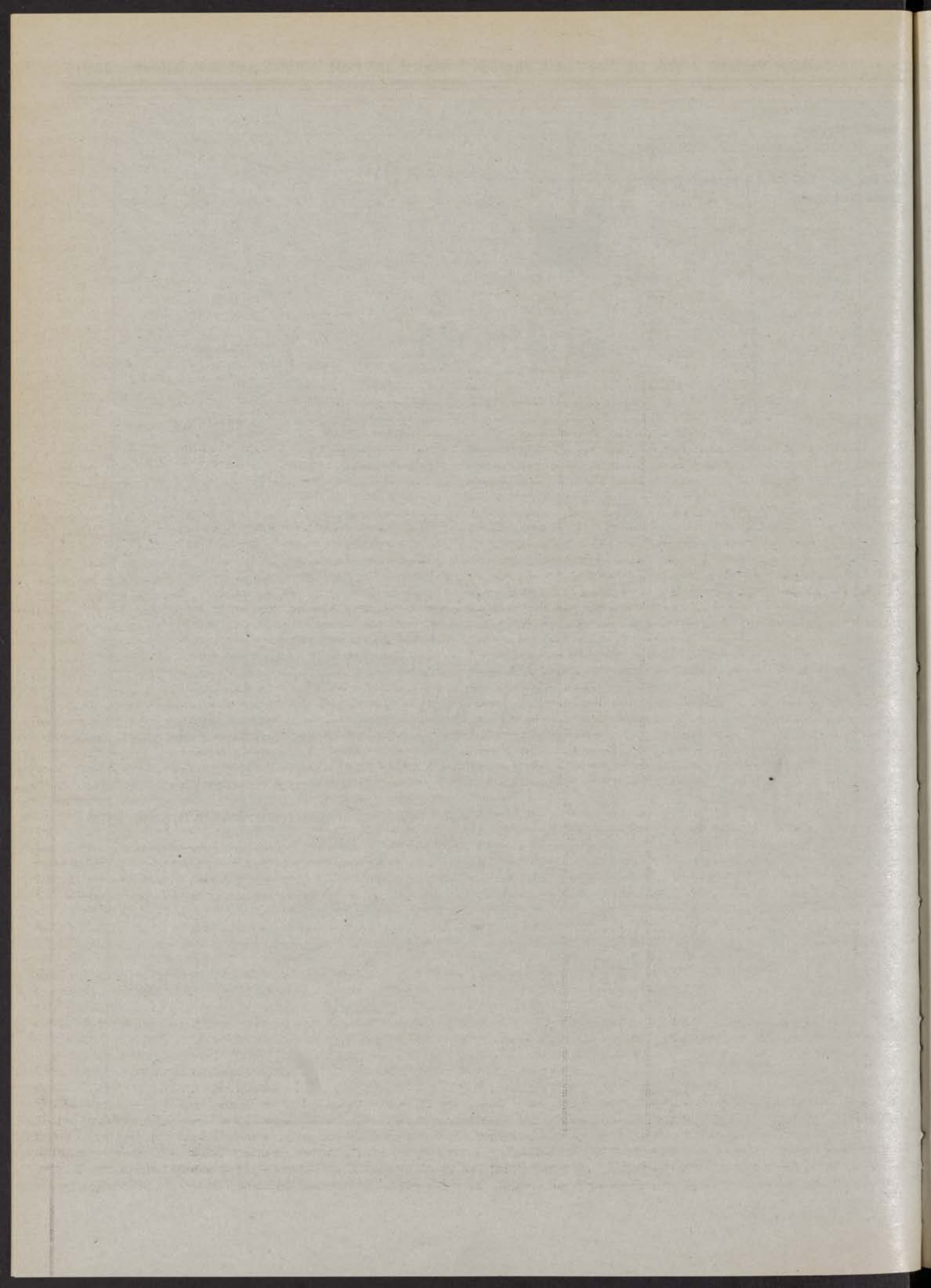
Dated: August 9, 1994.

Robert P. Davison,

*Acting Assistant Secretary, Fish, Wildlife and
Parks.*

[FR Doc. 94-20037 Filed 8-17-94; 8:45 am]

BILLING CODE 4310-55-0



Thursday
August 18, 1994

Report

Part V

**Office of
Management and
Budget**

Cumulative Report on Rescissions and
Deferrals; Notice

OFFICE OF MANAGEMENT AND BUDGET**Cumulative Report on Rescissions and Deferrals**

August 1, 1994.

This report is submitted in fulfillment of the requirement of Section 1014(e) of the Congressional Budget and Impoundment Control Act of 1974 (Pub. L. 93-344). Section 1014(e) requires a monthly report listing all budget authority for this fiscal year for which, as of the first day of the month, a special message has been transmitted to Congress.

This report gives the status of 65 rescission proposals and 12 deferrals contained in six special messages for FY 1994. These messages were transmitted to Congress on October 13, November 1,

and November 19, 1993; and on February 7, May 2, and June 8, 1994.

Rescissions (Attachments A and C)

As of August 1, 1994, 65 rescission proposals totaling \$3,172.2 million had been transmitted to the Congress. Congress approved 45 of the Administration's rescission proposals in P.L. 103-211. A total of \$1,286.7 million of the rescissions proposed by the President was rescinded by that measure. There are no rescission proposals pending before the Congress. Attachment C shows the status of the FY 1994 rescission proposals.

Deferrals (Attachments B and D)

As of August 1, 1994, \$2,216.6 million in budget authority was being deferred from obligation. Attachment D shows

the status of each deferral reported during FY 1994.

Information From Special Messages

The special messages containing information on the rescission proposals and deferrals that are covered by this cumulative report are printed in the **Federal Registers** cited below:

58 FR 54256, Wednesday, October 20, 1993
58 FR 59517, Tuesday, November 9, 1993
58 FR 63264, Tuesday, November 30, 1993
59 FR 7122, Monday, February 14, 1994
59 FR 24006, Monday, May 9, 1994
59 FR 32068, Tuesday, June 21, 1994

Alice M. Rivlin,

Acting Director.

BILLING CODE 3110-01-M

ATTACHMENT A

STATUS OF FY 1994 RESCISSIONS

	Amounts (In millions of dollars)
Rescissions proposed by the President.....	3,172.2
Rejected by the Congress.....	-1,885.5
Amounts rescinded by P.L. 103-211, the FY 1994 Emergency Supplemental Appropriations Act.....	-1,286.7
Currently before the Congress.....	0.0

ATTACHMENT B

STATUS OF FY 1994 DEFERRALS

	Amounts (In millions of dollars)
Deferrals proposed by the President.....	8,625.8
Routine Executive releases through August 1, 1994.. (OMB/Agency release of \$6,409.7 million, partially offset by cumulative positive adjustment of \$452 thousand.)	-6,409.2
Overtaken by the Congress.....	---
Currently before the Congress.....	2,216.6

ATTACHMENT C
Status of FY 1994 Rescission Proposals - As of August 1, 1994
 (Amounts in thousands of dollars)

Agency/Bureau/Account	Rescission Number	Amounts Pending Before Congress		Date of Message	Previously Withheld and Made Available	Date Made Available	Amount Rescinded	Congressional Action
		Less than 45 days	More than 45 days					
FUNDS APPROPRIATED TO THE PRESIDENT								
International Security Assistance	R94-1							
Foreign military financing grants.....	R94-1A		40,000	11-1-93	•		65,562	P.L. 103-211
			25,562	2-7-94	•		61,350	P.L. 103-211
Economic support fund.....	R94-2		90,000	11-1-93	•		438	P.L. 103-211
Military assistance.....	R94-3B		438	2-7-94	•			
Agency for International Development								
Development assistance fund.....	R94-3		160,000	11-1-93	•		104,019	P.L. 103-211
DEPARTMENT OF AGRICULTURE								
Agricultural Research Service								
Agricultural Research Service.....	R94-4		16,233	11-1-93	16,233	3-4-94		
Buildings and facilities.....	R94-5		8,460	11-1-93	8,460	3-4-94		
Cooperative State Research Service								
Cooperative State Research Service.....	R94-6		30,002	11-1-93	24,268	3-4-94	5,734	P.L. 103-211
Buildings and facilities.....	R94-7		34,000	11-1-93	31,103	3-4-94	2,897	P.L. 103-211
Agricultural Stabilization and Conservation Service								
Salaries and expenses.....	R94-8		12,167	11-1-93	12,167	3-1-94		
Soil Conservation Service								
Conservation operations.....	R94-9		12,167	11-1-93	12,167	3-1-94		
Farmers Home Administration								
Salaries and expenses.....	R94-10		12,167	11-1-93			12,167	P.L. 103-211

• Funds were never withheld from obligation.

ATTACHMENT C
Status of FY 1994 Rescission Proposals - As of August 1, 1994
(Amounts in thousands of dollars)

Agency/Bureau/Account	Rescission Number	Amounts Pending		Date of Message	Previously Withheld and Made Available	Date Made Available	Amount Rescinded	Congressional Action
		Less than 45 days	More than 45 days					
Rural Development Administration and Farmers Home Administration								
Rural housing insurance fund program account.....	R94-41		15,645	2-7-94			15,645	P.L. 103-211
Agricultural credit insurance fund program account.....	R94-39		5,094	2-7-94			5,094	P.L. 103-211
Rural Electrification Administration								
Rural electrification and telephone loans program account.....	R94-11 R94-40		6,445 5,688	11-1-93 2-7-94	6,445 2,383	3-1-94 3-1-94	3,305	P.L. 103-211
Food and Nutrition Service								
Commodity supplemental food program.....	R94-12		12,600	11-1-93	2,600	3-1-94	10,000	P.L. 103-211
Foreign Assistance Programs								
Public Law 480 grants - Titles I (OFD), II, and III....	R94-42		49,600	2-7-94	20,000	4-29-94	29,600	P.L. 103-211
Public Law 480 program account.....	R94-43		35,400	2-7-94	12,500	3-14-94	22,900	P.L. 103-211
DEPARTMENT OF COMMERCE								
National Oceanic and Atmospheric Administration								
Operations, research, and facilities.....	R94-13		6,000	11-1-93	6,000	3-1-94		
Construction.....	R94-14		4,000	11-1-93	1,000	3-1-94	3,000	P.L. 103-211
International Trade Administration								
Operations and administration.....	R94-15		2,000	11-1-93			2,000	P.L. 103-211
DEPARTMENT OF DEFENSE								
Procurement								
Missile procurement, Army.....	R94-44		48,000	2-7-94	48,000	3-24-94		
Aircraft procurement, Navy.....	R94-45		51,700	2-7-94	41,700	3-17-94	10,000	P.L. 103-211

• Funds were never withheld from obligation.

ATTACHMENT C
Status of FY 1994 Rescission Proposals - As of August 1, 1994
 (Amounts in thousands of dollars)

Agency/Bureau/Account	Rescission Number	Amounts Pending Before Congress		Previously Withheld and Made Available	Date Made Available	Amount Rescinded	Congressional Action
		Less than 45 days	More than 45 days				
Shipbuilding and conversion, Navy.....	R94-46	50,000		50,000	3-25-94		
Aircraft procurement, Air Force.....	R94-47	105,600		92,800	3-30-94	12,800	P.L. 103-211
Research, Development, Test, and Evaluation Research, development, test, and evaluation, Defense-wide.....	R94-48		50,000	40,000	3-26-94	10,000	P.L. 103-211
Military Construction							
Military construction, Army.....	R94-16	116,134		93,815	3-1-94	22,319	P.L. 103-211
Military construction, Air Force.....	R94-17	85,094		60,307	3-1-94	24,787	P.L. 103-211
Military construction, Army Reserve.....	R94-18	19,807		17,256	3-1-94	2,551	P.L. 103-211
Military construction, Naval Reserve.....	R94-19	4,438		3,812	3-1-94	626	P.L. 103-211
Military construction, Air Force Reserve.....	R94-20	18,759		16,897	3-1-94	1,862	P.L. 103-211
Military construction, Army National Guard.....	R94-21	251,854		244,286	3-1-94	7,568	P.L. 103-211
Military construction, Air National Guard.....	R94-22	105,138		98,951	3-1-94	6,187	P.L. 103-211
DEPARTMENT OF THE ARMY-CIVIL							
Army Corps of Engineers							
General investigations.....	R94-23	24,970		24,970	3-1-94		
Construction, general.....	R94-24	97,319		97,319	3-1-94		
DEPARTMENT OF ENERGY							
Energy Programs							
Energy supply, research and development activities.....	R94-25	97,300		97,300	3-1-94		
	R94-49	10,000			2-7-94	10,000	P.L. 103-211
Uranium supply and enrichment activities.....	R94-25	42,000			11-1-93	42,000	P.L. 103-211

ATTACHMENT C
Status of FY 1994 Rescission Proposals - As of August 1, 1994
(Amounts in thousands of dollars)

Agency/Bureau/Account	Rescission Number	Amounts Pending		Date of Message	Previously Withheld and Made Available	Date Made Available	Amount Rescinded	Congressional Action
		Less than 45 days	More than 45 days					
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT								
Housing Programs								
Annual contributions for assisted housing.....	R94-26		180,000	11-1-93	180,000	3-1-94		
Homeownership and opportunity for people everywhere grants (HOPE grants).....	R94-50		66,000	2-7-94			66,000	P.L. 103-211
DEPARTMENT OF INTERIOR								
Bureau of Reclamation								
Construction.....	R94-27		16,000	11-1-93	16,000	3-4-94		
DEPARTMENT OF STATE								
Administration of Foreign Affairs								
Salaries and expenses.....	R94-28		600	11-1-93	600	2-28-94		
Buying power maintenance.....	R94-51		8,800	2-7-94			8,800	P.L. 103-211
DEPARTMENT OF TRANSPORTATION								
Federal Aviation Administration								
Operations.....	R94-29		2,750	11-1-93	2,000	3-1-94	750	P.L. 103-211
Facilities and equipment.....	R94-30		40,257	11-1-93			40,257	P.L. 103-211
Grants-in-aid for airports (Airport and airway trust fund).....	R94-56		488,200	2-7-94			488,200	P.L. 103-211
Federal Transit Administration								
Discretionary grants.....	R94-31		52,037	11-1-93	51,228	3-1-94	809	P.L. 103-211
Federal Highway Administration								
Highway demonstration projects.....	R94-32		187,827	11-1-93	12,858	1-28-94	12,858	1-28-94
	R94-32A		-12,858	2-7-94	174,969	2-28-94	174,969	2-28-94

• Funds were never withheld from obligation.

ATTACHMENT C
Status of FY 1994 Rescission Proposals - As of August 1, 1994
 (Amounts in thousands of dollars)

Agency/Bureau/Account	Rescission Number	Amounts Pending Before Congress		Date of Message	Previously Withheld and Made Available	Date Made Available	Amount Rescinded	Congressional Action
		Less than 45 days	More than 45 days					
Federal Railroad Administration								
Railroad research and development.....	R94-55		17,000	2-7-94			17,000	P.L. 103-211
Coast Guard								
Operating expenses.....	R94-57	5,000		2-7-94	5,000	4-18-94		
Acquisition, construction, and improvements.....	R94-58	2,000		2-7-94	2,000	4-18-94		
Office of the Secretary								
Rental payments.....	R94-59	1,781		2-7-94			1,781	P.L. 103-211
Payments to air carriers (Airport and airway trust fund).....	R94-60	10,067		2-7-94			10,067	P.L. 103-211
DEPARTMENT OF THE TREASURY								
Financial Management Service								
Biomass energy development.....	R94-61		16,275	2-7-94			16,275	P.L. 103-211
GENERAL SERVICES ADMINISTRATION								
Public Buildings Service								
Federal buildings fund.....	R94-33 R94-33A	126,022 1,669		11-1-93 2-7-94	126,022 1,669	3-1-94 3-15-94		
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION								
Research and development.....	R94-62	88,000		2-7-94	25,000	2-23-94	63,000	P.L. 103-211
Space flight, control, and data communications.....	R94-63	32,000		2-7-94			32,000	P.L. 103-211
Construction of facilities.....	R94-64	25,000		2-7-94			25,000	P.L. 103-211
SMALL BUSINESS ADMINISTRATION								
Salaries and expenses.....	R94-34	13,100		11-1-93	13,100	3-1-94		

ATTACHMENT C
Status of FY 1994 Rescission Proposals - As of August 1, 1994
 (Amounts in thousands of dollars)

Agency/Bureau/Account	Rescission Number	Amounts Pending		Date of Message	Previously Withheld and Made Available	Date Made Available	Amount Rescinded	Congressional Action
		Less than 45 days	More than 45 days					
OTHER INDEPENDENT AGENCIES								
Board for International Broadcasting	R94-65		1,700	2-7-94			1,700	P.L. 103-211
Israel relay station.....								
National Science Foundation	R94-66		10,000	2-7-94	5,000	3-7-94	5,000	P.L. 103-211
Academic research infrastructure.....								
Nuclear Regulatory Commission	R94-67		12,700	2-7-94			12,700	P.L. 103-211
Salaries and expenses.....								
State Justice Institute	R94-35		6,775	11-1-93				
Salaries and expenses.....								
United States Information Agency	R94-36		3,000	11-1-93	1,000	3-1-94	2,000	P.L. 103-211
Salaries and expenses.....								
North/South Center.....	R94-37		8,700	11-1-93	7,700	3-1-94	1,000	P.L. 103-211
TOTAL RESCISSIONS.....		0	3,172,183		1,806,885		1,286,750	

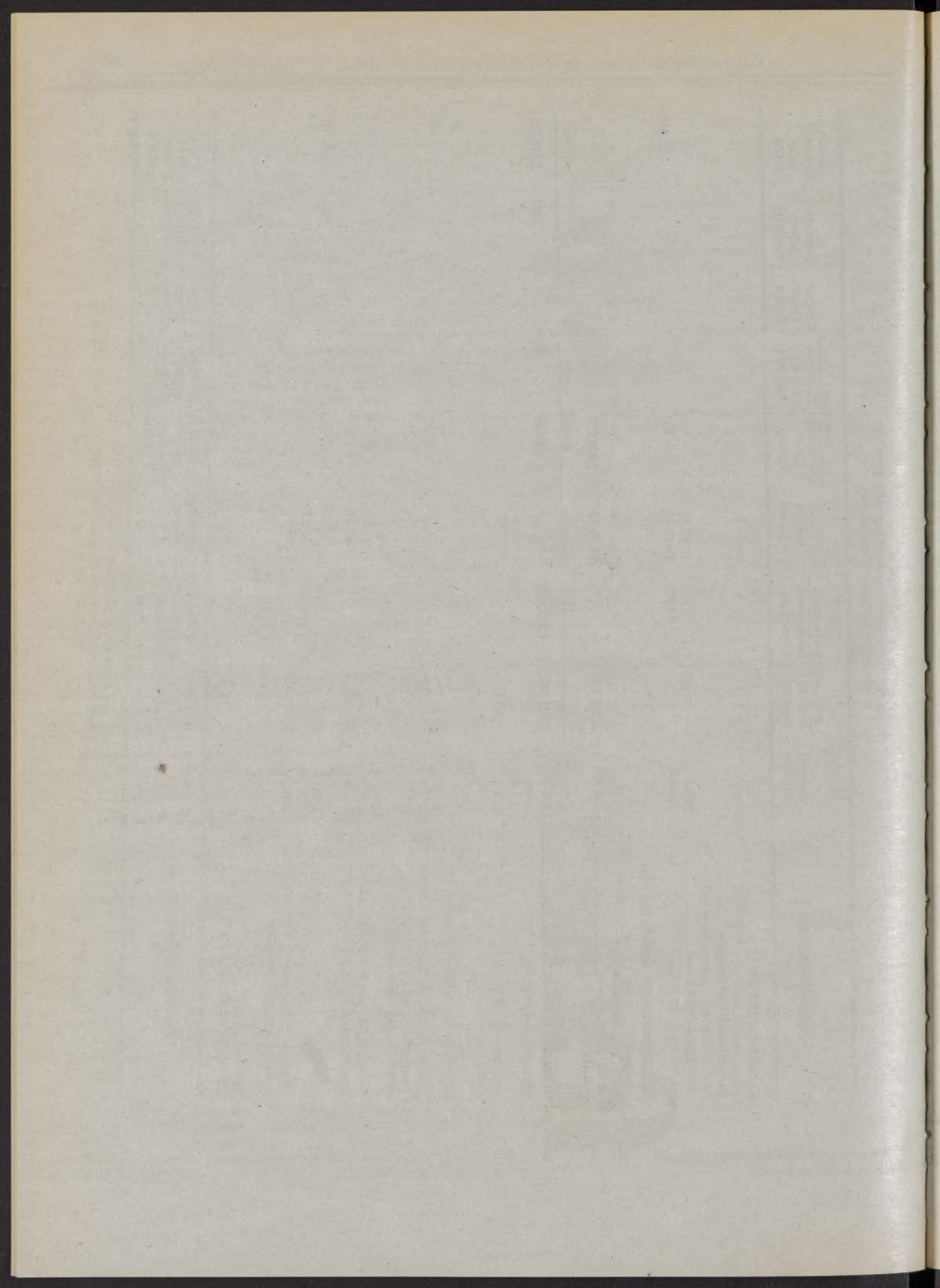
* Funds were never withheld from obligation.

ATTACHMENT D
Status of FY 1994 Deferrals - As of August 1, 1994
 (Amounts in thousands of dollars)

Agency/Bureau/Account	Deferral Number	Amounts Transmitted		Date of Message	Releases(-)		Congressional Action	Cumulative Adjustments (+)	Amount Deferred as of 8-1-94
		Original Request	Subsequent Change (+)		Cumulative OMB/Agency	Congressionally Required			
FUNDS APPROPRIATED TO THE PRESIDENT									
International Security Assistance Economic support fund.....	D94-1 D94-1A D94-1B	394,175	1,164,562 23,725	10-13-93 11-19-93 2-7-94	796,496	452		786,419	
Foreign military financing grants.....	D94-9	3,137,279		11-19-93	2,520,132			617,147	
Foreign military financing program account.....	D94-10	46,530		11-19-93	38,118			8,412	
Agency for International Development Demobilization and transition fund.....	D94-2	8,000		10-13-93				8,000	
International disaster assistance, executive.....	D94-11	118,059		11-19-93	115,147			2,912	
DEPARTMENT OF AGRICULTURE									
Forest Service Cooperative work.....	D94-3	461,639		10-13-93				506,741	
Expenses, brush disposal.....	D94-3A D94-4	40,195	45,102	6-8-94 10-13-93					
Timber salvage sales.....	D94-4A D94-5	256,897	8,230	6-8-94 10-13-93	52,483			48,425 204,414	
DEPARTMENT OF DEFENSE - CIVIL									
Wildlife Conservation, Military Reservations Wildlife conservation, Defense.....	D94-6	1,852		10-13-93	390			1,462	
DEPARTMENT OF HEALTH AND HUMAN SERVICES									
Social Security Administration Limitation on administrative expenses.....	D94-7	7,317	2	10-13-93 5-2-94				7,319	
Page 1									
03-Aug-94									

ATTACHMENT D
Status of FY 1994 Deferrals - As of August 1, 1994
(Amounts in thousands of dollars)

Agency/Bureau/Account	Deferral Number	Amounts Transmitted		Date of Message	Releases(-)		Amount Deferred as of 8-1-84
		Original Request	Subsequent Change (+)		Cumulative OMB/ Agency	Congress- ionally Required	
DEPARTMENT OF STATE							
Bureau for Refugee Programs							
United States emergency refugee and migration assistance fund.....	D94-8 D94-8A	27,100	49,261	10-13-93 11-19-93	51,061		25,300
GENERAL SERVICES ADMINISTRATION							
Public Buildings Service							
Public buildings fund.....	D94-12	2,835,860		11-19-93	2,835,860		0
TOTAL DEFERRALS.....		7,334,903	1,290,883		6,409,686	0	452 2,216,551



Federal Register

Thursday
August 18, 1994

Part VI

Department of Justice

Office of Justice Programs

Meeting of the Coalition for Juvenile
Justice; Notice

DEPARTMENT OF JUSTICE**Office of Justice Programs****Office of Juvenile Justice and
Delinquency Prevention; Meeting of
the Coalition for Juvenile Justice**

In accordance with the provisions of the Federal Advisory Committee Act (5 U.S.C. app. I), the Office of Juvenile Justice and Delinquency Prevention (OJJDP) announces the meeting of the Coalition for Juvenile Justice. This

conference will begin at 11:00 a.m. on September 22, 1994, and end at 11:30 a.m. on September 25, 1994. This advisory committee, chartered as the Coalition for Juvenile Justice, will meet at the Radisson at Keystone Crossing, 8787 Keystone Crossing, Indianapolis, Indiana 46240. The purpose of this meeting is to discuss and adopt recommendations from members regarding the committee's responsibility to advise the OJJDP Administrator, the President and the Congress about State

perspectives on the operation of the Office of Juvenile Justice and Delinquency Prevention and Federal legislation pertaining to juvenile justice and delinquency prevention.

This meeting will be open to the public.

John J. Wilson,

*Acting Administrator, Office of Juvenile
Justice and Delinquency Prevention.*

[FR Doc. 94-20253 Filed 8-17-94; 8:45 am]

BILLING CODE 4410-18-P

Federal Register

Thursday
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Part VII

Department of Housing and Urban Development

**Office of the Assistant Secretary for
Public and Indian Housing**

**24 CFR part 955
Public and Indian Housing: Indian Loan
Guarantee Program; Housing Financing
on Restricted Lands; Final Rule**

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Part 955

[Docket No. R-94-1730; FR-3614-I-01]

RIN 2577-AB40

Loan Guarantees for Indian Housing

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Interim rule.

SUMMARY: This interim rule sets forth regulations to implement the Indian Loan Guarantee Program authorized by section 184 of the Housing and Community Development Act of 1992. The purpose of the program is to provide loan guarantees that will make private financing available to Native Americans in restricted lands where no source of financing is currently available.

DATES: Effective date: September 19, 1994.

Comments due date: October 17, 1994.

ADDRESSES: Interested persons are invited to submit comments regarding this interim rule to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500. Communications should refer to the above docket number and title. Facsimile (FAX) comments are *not* acceptable. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: Dominic Nessi, Director, Office of Native American Programs, Room B-133, Department of Housing and Urban Development, Washington, DC 20410; telephone (202) 755-0032 (voice) or (202) 708-0850 (TDD for speech or hearing impaired individuals). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act Statement

The information collection requirements contained in this interim rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520). No person may be subjected to a penalty for failure to comply with these information collection requirements until they have

been approved and assigned an OMB control number. The OMB control number, when assigned, will be announced by separate notice in the *Federal Register*.

The public reporting burden for each of these collections of information is estimated to include the time for reviewing and instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided under the preamble heading, *Other Matters*. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Housing and Urban Development, Rules Docket Clerk, 451 Seventh Street, SW., Room 10276, Washington, DC 20410; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention Desk Officer for HUD, Washington, DC 20503.

II. Background

Section 184 of the Housing and Community Development Act of 1992 (HCDA 1992) (Pub. L. 102-550, approved October 28, 1992) authorized the establishment of the Indian Housing Loan Guarantee Fund (the Fund) to provide access to sources of private financing to Indian families and Indian housing authorities who otherwise could not acquire housing financing because of the unique legal status of Indian trust land. In general, these lands, held in trust by the United States for the benefit of an Indian or Indian tribe, are inalienable. Trust lands under this program also include lands to which the title is held by an Indian tribe subject to a restriction against alienation imposed by the United States. Because titles to individual plots do not convey, and liens do not attach, conventional mortgage lending practices do not operate in this forum.

The Fund addresses these obstacles to mortgage financing by guaranteeing loans made to Indian families or Indian housing authorities to construct, acquire, or rehabilitate 1- to 4-family dwellings that are standard housing and are located on trust land or land located in an Indian or Alaska Native area. Loans may be made by any lender approved by the Secretary of Housing and Urban Development, the Secretary of Agriculture, or the Secretary of Veterans Affairs; or, any lender which is supervised, approved, regulated or insured by any agency of the Federal Government.

Although HCDA 1992 authorized the establishment of the Loan Guarantee Fund for fiscal years 1993 and 1994, no funds were appropriated until 1994. One million dollars was appropriated in FY 1994 to capitalize the guarantee fund allowing the Department to extend \$7 million in loan guarantees.

The traditional Indian Housing program targets and serves the neediest among the Native American population—the low- and very low-income families. While a large number of Native Americans fall into these income groups, there are families who live on reservations, or who wish to return to their Native land, whose incomes would allow them to afford a home loan, but who cannot construct a home in Indian country because of the unique legal status of Indian land. The Indian Loan Guarantee program will assist these persons in attaining homeownership on their native land.

Notwithstanding the availability of mortgage insurance under the Federal Housing Administration's Section 248 program, the private lending market has been reluctant to provide mortgage money in Indian country. The limited use of that program has been due in large part to the lack of awareness of the availability of mortgage insurance by both borrowers and lenders. In addition, until very recently the program was limited in applicability because it did not allow insurance of the construction loan, and it adheres to the underwriting, mortgage credit, and appraisal standards of the non-Indian, single-family mortgage insurance program. These standards may not be appropriate in Indian country. A real deterrent of Section 248 for Indian tribes is the potential for transfer of the home to a non-Indian in the event of default and foreclosure. The new program under this interim rule has features that are more appropriate for the Native American culture, and the potential for a unit to be transferred to a non-Indian is avoided.

Perhaps the most significant feature of the statute authorizing this new program is that it permits loans to be secured by any collateral authorized under Federal, State, or local law. This innovative approach addresses the basic difference in providing housing loans for Indian trust lands, the fact that interests in these land are encumbered in ways that land interests in conventional mortgage markets are not. This element of uncertainty has certainly played a role in the failure of private lenders to provide mortgage services for Indian trust lands. This interim rule, in addition to making loan guarantees available, makes clear, at § 955.111, that

the collateral for loans to construct, acquire, or rehabilitate one- to four-family dwellings on trust land need not consist of real property and the improvements upon it, but may consist of anything of value determined by the lender and approved by the Department to be sufficient to cover the amount of the loan, and may include, but is not limited to, the property and/or improvements to be acquired, constructed, or rehabilitated, to the extent that an interest in such property is not subject to the restrictions of trust lands against alienation; a first or second mortgage on property other than trust land; personal property; or cash, notes, an interest in securities, royalties, annuities, or any other property that is transferable and whose present value may be determined. This use of various forms of collateral is consistent with the targeting of moderate income families, as discussed above, as the primary beneficiaries of this program.

This interim rule follows the statutory language very closely, and imposes additional regulatory requirements only where necessary to implement the program. The statute provides that a loan may be guaranteed for approval under this program only where "there is a reasonable prospect of repayment of the loan." The interim rule, therefore, adds a number of requirements taken from the Department's conventional mortgage programs to address this issue.

One requirement that is added, at § 955.111(b)(3), is to tie loan eligibility, where trust land is the collateral for the loan, to the presence of eviction procedures. Before HUD will issue any commitment to guarantee such a loan on Indian land, the tribe having jurisdiction over such property must certify to the Department that it has adopted and will enforce procedures for eviction of defaulted mortgagors where the guaranteed loan has been foreclosed.

In other instances where the statute has placed the interpretation of a provision within the Department's discretion, the Department has attempted to provide the broadest interpretation, as discussed below.

The law allows the guarantee to cover "up to" 100 percent of the unpaid principal and interest. The regulation provides, at § 955.113(a), for 100 percent coverage. This position is based on the FHA mortgage insurance programs which insure 100 percent of the principal and interest and provide for payment of other allowable expenses in the event of a claim.

A loan term of "up to" 30 years is allowed at § 955.105(b)(1), as permitted by the statute, but is not required, because there may be instances where terms less than 30 years will be desirable to both the borrower and lender. The Department has determined that this program should have the flexibility to guarantee most standard loan products, with the exception of adjustable rate mortgages. In a totally new lending environment, the uncertainty of an adjustable rate would create an unnecessary risk to the borrower, the lender and the Department.

Section 184 requires the Department to set forth requirements for standard housing. These requirements are established at § 955.107(b)(1), and conform with those established for the FHA single family mortgage insurance programs.

Other Matters

Justification for Interim Rulemaking

The Department has determined that this interim rule should be adopted without the delay occasioned by requiring prior notice and comment. This interim rule simply constitutes the implementation of statutory language with the exercise of little or no discretion on the part of the Department. As such, prior notice and comment are unnecessary under 24 CFR Part 10. Section 955.125 is added to implement a Department-wide policy that provides for the expiration of interim rules within a set period of time if they are not issued in final form before the end of the period. The expiration period may be extended by notice published in the **Federal Register**. The expiration date for this interim rule is July 31, 1995.

Impact on Small Entities

The Department, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this interim rule before publication and by approving it certifies that this interim rule does not have a significant economic impact on a substantial number of small entities. Specifically, this interim rule implements a loan guarantee program targeted to a very specific population, and is not expected to affect a substantial number of small entities.

Environmental Review

A Finding of No Significant Impact with respect to the environment has

been made in accordance with HUD regulations at 24 CFR Part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk.

Federalism Impact

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this interim rule will not have substantial direct effects on states or their political subdivisions, or the relationship between the federal government and the states, or on the distribution of power and responsibilities among the various levels of government. As a result, the interim rule is not subject to review under the order. Specifically, the requirements of this interim rule are directed to individual borrowers and financial institutions.

Impact on the Family

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this interim rule has potential for significant impact on family formation, maintenance, and general well-being. The Indian Loan Guarantee Program will make it possible for Native American families to build or acquire homes on their Native lands where homeownership opportunities have been very limited in the past. Accordingly, since the impact on the family is beneficial, no further review is considered necessary.

Regulatory Agenda

This interim rule was listed as item 1682 in the Department's Semiannual Agenda of Regulations published on April 25, 1994 (59 FR 20424, 20469) in accordance with Executive Order 12866 and the Regulatory Flexibility Act.

Public Reporting Burden

The information collection requirements contained in this interim rule have been submitted to the Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520). The Department has determined that the following provisions contain information collection requirements:

Sections	No. of respondents	Frequency respondents	Estimated average response time (in hours)	Estimated annual burden (in hours)
Reporting burden:				
Individuals 955.105	150	1	2	300
Lending Institutions 955.113, 955.115, 955.119, 955.123	15	10	8	1,200
Tribes 955.105	15	1	1	15
Total reporting burden				1,515
Recordkeeping burden: 955.105, 955.115, 955.119, 955.123	15	12	.24	43.2
Total recordkeeping burden				43.2

List of Subjects in 24 CFR Part 955

Indians, Loan programs—Indians, Reporting and recordkeeping requirements.

Accordingly, chapter IX of title 24 of the Code of Federal Regulations is amended by adding a new part 955, consisting of §§ 955.101 through 955.125, as follows:

PART 955—LOAN GUARANTEES FOR INDIAN HOUSING

Sec.

- 955.101 Applicability and scope.
- 955.103 Definitions.
- 955.105 Eligible loans.
- 955.107 Eligible housing.
- 955.109 Eligible lenders.
- 955.111 Eligible collateral.
- 955.113 Certificate of guarantee.
- 955.115 Guarantee fee.
- 955.117 Liability under guarantee.
- 955.119 Transfer and assumptions.
- 955.121 Disqualification of lenders and civil money penalties.
- 955.123 Payment under guarantee.
- 955.125 Expiration of interim rule.

Authority: 42 U.S.C. 1715z-13a and 3535(d).

§ 955.101 Applicability and scope.

(a) *General.* Under the provisions of section 184 of the Housing and Community Development Act of 1992 (Pub. L. 102-550, approved October 28, 1992), the Department of Housing and Urban Development has the authority to guarantee loans for the construction, acquisition, or rehabilitation of 1- to 4-family homes to be owned by Native Americans on restricted Indian lands. This part describes the eligibility of borrowers, lenders and property, as well as the benefits of the Indian Loan Guarantee Program.

(b) *Other HUD regulations and requirements.* The provisions of this part are supplemented by parts in other chapters of title 24 of the Code of Federal Regulations, as applicable.

§ 955.103 Definitions.

Default means the failure by a borrower to make any payment or to perform any other obligation under the

terms of a loan, and such failure continues for a period of more than 30 days.

Department means the U.S. Department of Housing and Urban Development (HUD).

Guarantee Fund means the Indian Housing Loan Guarantee Fund established under section 184(i) of the Housing and Community Development Act of 1992.

Indian means any person recognized as being Indian or Alaska Native by an Indian tribe, the Federal Government, or any State, and includes the term "Native American".

Indian area means the area within which an Indian housing authority is authorized to provide housing.

Indian Housing Authority (IHA) means any entity that is authorized to engage in or assist in the development or operation of low-income housing for Indians and that is established either:

- (1) By exercise of the power of self-government of an Indian tribe independent of State law; or
- (2) By operation of State law providing specifically for housing authorities for Indians, including regional housing authorities in the State of Alaska.

Mortgage as used in this part, means a first lien as is commonly given to secure advances on, or the unpaid purchase price of, real estate under the laws of the jurisdiction where the property is located and may refer both to a security instrument creating a lien, whether called a mortgage, deed of trust, security deed, or another term used in a particular jurisdiction, as well as the credit instrument, or note, secured thereby.

Principal residence means the dwelling where the mortgagor maintains (or will maintain) his or her permanent place of abode, and typically spends (or will spend) the majority of the calendar year. A person may have only one principal residence at any one time.

Secretary means the Secretary of Housing and Urban Development.
Standard housing means a dwelling

unit or housing that complies with the requirements established in this part.

Tribe means any tribe, band, pueblo, group, community, or nation of Indians or Alaska Natives.

Trust land means land, title to which is held by the United States for the benefit of an Indian or Indian tribe; or, land, title to which is held by an Indian tribe, subject to a restriction against alienation imposed by the United States.

§ 955.105 Eligible loans.

(a) *Eligible borrowers.* A loan guaranteed under this part may be made to a borrower that is:

(1) An Indian who will occupy it as a principal residence and who is otherwise qualified under this part; or

(2) An Indian Housing Authority.

(b) *Terms of loan.* The loan shall:

(1) Be made for a term not exceeding 30 years;

(2) Bear interest (exclusive of the guarantee fee and service charges, if any) at a fixed rate agreed upon by the borrower and the lender and determined by the Department to be reasonable, which may not exceed the rate generally charged in the area (as determined by the Department) for home mortgage loans not guaranteed or insured by any agency or instrumentality of the Federal Government.

(c) *Maximum mortgage amounts.* (1) A principal obligation may not exceed:

(i) An amount equal to the sum of:

(A) 97 percent of the first \$25,000 of the appraised value of the property, as of the date the loan is accepted for guarantee; and

(B) 95 percent of such value in excess of \$25,000; and

(ii) Amounts approved otherwise by the Department under this section.

(2) The balance of the purchase price must involve a payment on account of the property that may be:

(i) In cash or other property of equivalent value acceptable to the lender and the Department; or

(ii) The value of any improvements to the property made through the skilled or unskilled labor of the borrower,

appraised in accordance with generally acceptable practices and procedures.

(d) *Construction advances.* The Department may guarantee loans from which advances will be made during construction. The Department will provide guarantees for advances made by the mortgagee during construction if all of the following conditions are satisfied:

(1) The mortgagor and the mortgagee execute a building loan agreement, approved by HUD, setting forth the terms and conditions under which advances will be made;

(2) The advances are made only as provided in the commitment;

(3) The principal amount of the mortgage is held by the mortgagee in an interest bearing account, trust, or escrow for the benefit of the mortgagor, pending advancement to the mortgagor or to his or her creditors as provided in the loan agreement; and

(4) The mortgage shall bear interest on the amount advanced to the mortgagor or to his or her creditors and on the amount held in an account or trust for the benefit of the mortgagor.

(e) *Prohibited loans.* Adjustable rate mortgages are not permitted under this program.

§ 955.107 Eligible housing.

(a) *In general.* A loan guaranteed under this part may be used for the construction, acquisition, or rehabilitation of 1- to 4-family dwellings located on trust land or land located in an Indian area.

(b) *Safety and quality standards.*

Loans guaranteed under this part shall be made only on dwelling units which meet safety and quality standards set forth herein. Each unit must:

(1) Be decent, safe, sanitary, and modest in size and design;

(2) Conform with applicable general construction standards for the region;

(3) Contain a heating system that:

(i) Has the capacity to maintain a minimum temperature in the dwelling of 65 degrees Fahrenheit during the coldest weather in the area;

(ii) Is safe to operate and maintain;

(iii) Delivers a uniform distribution of heat; and

(iv) Conforms to any applicable tribal heating code or, if there is not applicable tribal code, an appropriate county, State, or National code;

(4) Contain a plumbing system that:

(i) Uses a properly installed system of piping;

(ii) Includes a kitchen sink and a partitioned bathroom with lavatory, toilet, and bath or shower; and

(iii) Uses water supply, plumbing and sewage disposal systems that conform to

any applicable tribal code or, if there is no applicable tribal code, the minimum standards established by the applicable county or State;

(5) Contain an electrical system using wiring and equipment properly installed to safely supply electrical energy for adequate lighting and for operation of appliances that conforms to any applicable tribal code or, if there is no applicable tribal code, an appropriate county, State, or National code;

(6) Be not less than:

(i) 570 square feet in size, if designed for a family of not more than 4 persons;

(ii) 850 square feet in size, if designed for a family of not less than 5 and more than 7 persons; and

(iii) 1020 square feet in size, if designed for a family of not less than 8 persons; or

(iv) The size provided under the applicable locally adopted standards for size of dwelling units; except that the Department, upon the request of a tribe or Indian housing authority, may waive the size requirements under this paragraph; and

(7) Conform with the energy performance requirements for new construction established by the Department under section 526(a) of the National Housing Act (12 U.S.C. 1735f-4).

§ 955.109 Eligible lenders.

The loan shall be made only by a lender approved by and meeting qualifications established in this part, except that loans otherwise insured or guaranteed by any agency of the Federal Government, or made by an organization of Indians from amounts borrowed from the United States shall not be eligible for guarantee under this part. The following lenders are deemed to be approved under this part:

(a) Any mortgagee approved by the Department of Housing and Urban Development for participation in the single family mortgage insurance program under title II of the National Housing Act (12 U.S.C. 1707).

(b) Any lender whose housing loans under chapter 37 of title 38, United States Code are automatically guaranteed pursuant to section 1802(d) of such title.

(c) Any lender approved by the Department of Agriculture to make guaranteed loans for single family housing under the Housing Act of 1949 (42 U.S.C. 1441).

(d) Any other lender that is supervised, approved, regulated, or insured by any agency of the Federal Government.

§ 955.111 Eligible collateral.

(a) *In general.* A loan guaranteed under this part may be secured by any collateral authorized under Federal, State, or tribal law and determined by the lender and approved by the Department to be sufficient to cover the amount of the loan, and may include, but is not limited to, the following:

(1) The property and/or improvements to be acquired, constructed, or rehabilitated, to the extent that an interest in such property is not subject to the restrictions of trust lands against alienation;

(2) A first or second mortgage on property other than trust land;

(3) Personal property; or

(4) Cash, notes, an interest in securities, royalties, annuities, or any other property that is transferable and whose present value may be determined.

(b) *Trust land as collateral.* If trust land is used as collateral for the loan, the following additional provisions apply:

(1) *Approved Lease.* Any land lease for a unit financed under this part must be on a form approved by both HUD and the Bureau of Indian Affairs, U.S. Department of Interior.

(2) *Assumption or sale of leasehold.* If a leasehold is used as security for the loan, the loan form must contain a provision requiring tribal consent before any assumption of an existing lease, except where title to the leasehold interest is obtained by the Department through foreclosure of the guaranteed mortgage. A mortgagee other than the Department must obtain tribal consent before obtaining title through a foreclosure sale. Tribal consent must be obtained on any subsequent transfer from the purchaser, including the Department, at foreclosure sale. The lease may not be terminated by the lessor without HUD's approval while the mortgage is guaranteed or held by the Department.

(3) *Priority of loan obligation.* Any tribal government whose courts have jurisdiction to hear foreclosures must enact a law providing for the satisfaction of a loan guaranteed or held by the Department before other obligations (other than tribal leasehold taxes against the property assessed after the property is mortgaged) are satisfied.

(4) *Eviction procedures.* Before HUD will guarantee a loan secured by trust land, the tribe having jurisdiction over such property must certify to the Department that it has adopted and will enforce procedures for eviction of defaulted mortgagors where the guaranteed loan has been foreclosed.

(i) *Enforcement.* If the Department determines that the tribe has failed to enforce adequately its eviction procedures, HUD will cease issuing guarantees for loans for tribal members except pursuant to existing commitments. Adequate enforcement is demonstrated where prior evictions have been completed within 60 days after the date of the notice by HUD that foreclosure was completed.

(ii) *Review.* If the Department ceases issuing guarantees in accordance with the first sentence of paragraph (c)(1) of this section, HUD shall notify the tribe of the reasons for such action and that the tribe may, within 60 days after notification of HUD's action, file a written appeal with the Field Office of Native American Programs (FONAP) Administrator. Within 60 days after notification of an adverse decision of the appeal by the FONAP Administrator, the tribe may file a written request for review with the headquarters Director, Office of Native American Programs (ONAP). Upon notification of an adverse decision by the ONAP Director, the tribe has 60 additional days to file an appeal with the Assistant Secretary for Public and Indian Housing. The determination of the Assistant Secretary shall be final, but the tribe may resubmit the issue to the Assistant Secretary for review at any subsequent time if new evidence or changed circumstances warrant reconsideration. (Any other administrative actions determined to be necessary to debar a tribe from participating in this program will be subject to the formal debarment procedures contained in 24 CFR part 24).

§ 955.113 Certificate of guarantee.

(a) *Extent of guarantee.* A certificate issued in accordance with this section guarantees 100 percent of the unpaid principal and interest of the underlying loan.

(b) *Approval process.* Before the Department approves any loan for guarantee under this part, the lender shall submit the application or the loan to the Department for examination. If the Department approves the loan for guarantee, the Department will issue a certificate under this part as evidence of the guarantee.

(c) *Standard for approval.* (1) The Department may approve a loan for guarantee under this part and issue a certificate under this section only if the Department determines there is a reasonable prospect of repayment of the loan based on criteria established pursuant to this part.

(2) The Department will assure that the value of the property has been established in accordance with current regulatory and administrative requirements.

(3) Before approval of a loan for guarantee, the Department will assure that all required environmental reviews pursuant to 24 CFR Part 50 have been performed and, if necessary, all findings have been successfully resolved.

(d) *Effect.* A certificate of guarantee issued under this section by the Department shall be conclusive evidence of the eligibility of the loan for guarantee under the provisions of this part and the amount of such guarantee. Such evidence shall be incontestable in the hands of the bearer and the full faith and credit of the United States is pledged to the payment of all amounts agreed to be paid by the Department as security for such obligations.

(e) *Fraud and misrepresentation.* Nothing in this part may preclude the Department from establishing:

(1) Defenses against the original lender based on fraud or material misrepresentation; and

(2) Establishing partial defenses, based upon regulations in effect on the date of issuance or disbursement (whichever is earlier), to the amount payable on the guarantee.

§ 955.115 Guarantee fee.

The lender shall pay to the Department, at the time of issuance of the guarantee, a fee for the guarantee of loans under this section, in an amount equal to 1 percent of the principal obligation of the loan. This amount is payable by the borrower at closing.

§ 955.117 Liability under guarantee.

The liability under a guarantee provided in accordance with this part shall decrease or increase on a pro rata basis according to any decrease or increase in the amount of the unpaid obligation under the provisions of the loan agreement.

§ 955.119 Transfer and assumptions.

Notwithstanding any other provision of law, any loan guaranteed under this part, including the security given for the loan, may be sold or assigned by the lender to any financial institution subject to examination and supervision by an agency of the Federal Government or of any State or the District of Columbia.

§ 955.121 Disqualification of lenders and civil money penalties.

(a) *General.* If the Department determines that any lender or holder of a guarantee certificate under § 955.113 has failed to maintain adequate

accounting records, to adequately service loans guaranteed under this section to exercise proper credit or underwriting judgement, or has engaged in practices otherwise detrimental to the interest of a borrower or the United States, the Department may:

(1) Refuse, either temporarily or permanently, to guarantee any further loans made by such lender or holder;

(2) Bar such lender or holder from acquiring additional loans guaranteed under this section; and

(3) Require that such lender or holder assume not less than 10 percent of any loss on further loans made or held by the lender or holder that are guaranteed under this section.

(b) *Civil money penalties for intentional violations.* If the Department determines that any lender or holder of a guarantee certificate under § 955.113 has intentionally failed to maintain adequate accounting records, to adequately service loans guaranteed under this section, or to exercise proper credit or underwriting judgement, the Department may impose a civil money penalty on such lender or holder in the manner and amount provided under section 536 of the National Housing Act (12 U.S.C. 1735f-14) with respect to mortgagees and lenders under such Act.

(c) *Payment of loans made in good faith.* Notwithstanding paragraphs (a) and (b) of this section, the Department may not refuse to pay pursuant to a valid guarantee on loans of a lender or holder barred under this section if the loans were previously made in good faith.

§ 955.123 Payment under guarantee.

(a) *Lender options.* (1) *General.* In the event of default by the borrower on a loan guaranteed under this part, the holder of the guarantee certificate shall provide written notice of the default to the Department. Upon providing this notice, the holder of the guarantee certificate will be entitled to payment under the guarantee (subject to the provisions of this part) and may proceed to obtain payment in one of the following manners:

(i) *Foreclosure.* The holder of the certificate may initiate foreclosure proceedings in a court of competent jurisdiction (after providing written notice of such action to the Department) and upon a final order by the court authorizing foreclosure and submission to the Department of a claim for payment under the guarantee, the Department will pay to the holder of the certificate the pro rata portion of the amount guaranteed (as determined in accordance with § 955.117) plus reasonable fees and expenses as

approved by the Department. The Department will be subrogated to the rights of the holder of the guarantee and the lender holder shall assign the obligation and security to the Department.

(ii) *No foreclosure.* Without seeking a judicial foreclosure (or in any case in which a foreclosure proceeding initiated under paragraph (a)(1)(i) of this section continues for a period in excess of 1 year), the holder of the guarantee may submit to the Department a claim for payment under the guarantee and the Department will only pay to such holder for a loss on any single loan an amount equal to 90 percent of the pro rata portion of the amount guaranteed (as determined in accordance with § 955.117). The Department will be subrogated to the rights of the holder of the guarantee and the holder shall assign the obligation and security to the Department.

(2) *Requirements.* Before any payment under a guarantee is made under paragraph (a)(1) of this section, the holder of the guarantee shall exhaust all

reasonable possibilities of collection. Upon payment, in whole or in part, to the holder, the note of judgement evidencing the debt shall be assigned to the United States and the holder shall have no further claim against the borrower or the United States.

(b) *Assignment by the Department.* Notwithstanding paragraph (a) of this section, upon receiving notice of default on a loan guaranteed under this section from the holder of the guarantee, the Department may accept assignment of the loan if the Department determines that the assignment is in the best interests of the United States. Upon assignment the Department will pay to the holder of the guarantee the pro rata portion of the amount guaranteed (as determined in accordance with § 955.117). The Department will be subrogated to the rights of the holder of the guarantee and the holder shall assign the obligation and security to the Department.

(c) *Limitations on liquidation.* In the event of a default by the borrower on a loan guaranteed under this section

involving a security interest in tribal allotted or trust land, the Department will only pursue liquidation after offering to transfer the account to an eligible tribal member, the tribe, or the Indian housing authority serving the tribe or tribes. If the Department subsequently proceeds to liquidate the account, the Department will not sell, transfer, otherwise dispose of or alienate the property except to one of the entities described in the preceding sentence.

§ 955.125 Expiration of interim rule.

This part shall expire and shall not be in effect after July 31, 1995, unless it is published as a final rule or the Department publishes a notice in the *Federal Register* to extend the effective date.

Dated: August 10, 1994.

Joseph Shuldiner,

Assistant Secretary for Public and Indian Housing.

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